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Supreme Court of the United States.

OCTOBER TERM, 1897.

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No. 486.

THE GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY and H. F. HILL and W. H. SEAY,

Plaintiffs in Error,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

Brief on Behalf of Plaintiffs in Error.

JAS. A. BAKER,
R. S. LOVETT,
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R. A. Brandon, Printer and Typewriter Manufacturer, N. Y.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 428.

THE GALVESTON, HARRISBURG AND SAN ANTONIO RAILWAY COMPANY and E. P. HILL and W. N. SHAW,
Plaintiffs in Error,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

This suit was instituted on the 5th of January, 1893, in the District Court of Brewster County, Texas, by the State of Texas, as plaintiff, against the Galveston, Harrisburg and San Antonio Railway Company, as defendant, for the recovery of

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1,383 tracts of land, containing in the aggregate 879,070 1–20 acres of land situated in certain counties of the State. This land had been previously granted to the railway company by the State out of its unappropriated domain, under laws of the State passed for the purpose of inducing and aiding the railway company to construct the lines of railway which it was authorized by these laws and its charter to construct. The ground upon which the State sought to recover the lands in question was that, at the time the road for which they were granted was constructed by the railway company and the certificates therefor were issued and located, there were no valid laws of the State making or authorizing such grant of land; that if any such laws had once existed, which was denied, they had been repealed by the Constitution of 1869. The State Court decided that the laws under which the land had been granted to the railway company had been repealed by the Constitution of 1869, and, in so deciding, it overruled and denied a defense, specially pleaded and urged by the railway company, that, in so far as the provisions of the Constitution of 1869 could be construed as repealing the laws under which it was entitled to the grant of lands, they impaired

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the obligations of its contract with the State and deprived it of vested rights, in violation of the Constitution of the United States, especially Article I., Section 10, thereof, and Article XIV., Section 1, of the amendments.

The petition of the State describes the lands sought to be recovered by reference to exhibits annexed, which give the certificate numbers, number of acres, date of issuance of certificates, county of location, survey, block and abstract number, and whether and when patented. It appeared from this description that the certificates in question had been issued for sections of completed railroad, beginning at a point near the Colorado River and ending at a point near the Guadalupe River. The line of track starts near the Town of Columbus and extends westward to within about thirty-six miles of the City of San Antonio. Its total length is about ninety-five miles. The petition then alleges that each of the certificates referred to in the exhibits were issued to the Galveston, Harrisburg and San Antonio Railway Company, and were by that company located and surveyed upon the lands in controversy, and were returned to and are on file in the General Land Office of the State, and, in the cases enumerated

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in the exhibits, patents have been issued thereon; that, by reason of these locations and surveys, the railway company has entered upon and taken possession of the land, and now unlawfully withholds the same from the State. The petition next recites that the Buffalo Bayou, Brazos and Colorado Railroad Company was chartered by special act of the Legislature of the State of Texas, approved February 11, 1850; that, by special Act of the Legislature, approved February 11, 1854, that railroad company, and the defendant company, as its successor, was restricted to an extension of its road to Austin and to a line extending thence to a connection with any road running north of Austin to the Pacific Ocean; that said railroad companies were not entitled to receive any lands for the construction of any road from Columbus to San Antonio and westward for which it had received certificates; that, by special act of the Legislature, approved July 27, 1870, the name of the Buffalo Bayou, Brazos and Colorado Railroad Company was changed to The Galveston, Harrisburg and San Antonio Railway Company, the defendant: and, under the provisions of that special act, the defendant company, for the first time, was granted

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the authority to construct a railway to San Antonio from Columbus to the Guadalupe bridge and over the line for which the certificates were issued, and at that time the Constitution of 1869–70 forbade the Legislature to authorize or grant lands to railway companies for the construction of their roads, though no land was granted by said act. The petition then gives the dates between which each section of the line of railroad for which land certificates were issued was constructed and completed, and represents that every portion of the road from the Town of Columbus to the Guadalupe River was constructed and completed between July 27th, 1870, and October 27th, 8876. And it is averred that at no time during that period was there any valid law in existence authorizing the issuance to the railroad company of certificates for the construction of its line of road between the points named. The petition charges that the action of the State authorities in issuing and delivering to the railway company the land certificates, and in permitting them to be located and surveyed upon the lands in controversy, and returned to and filed in the General Land Office of the State, as well as the issuance of patents thereon, was had and done without authority of law and in plain violation of

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the Constitution and laws of the State in force at that time. It is finally alleged that, by reason of the unlawful acts of the company in obtaining and holding the certificates and in locating them upon the lands of the State, it holds out to the world that it has some kind of title to the lands, and a cloud is cast upon the title of the State thereto. The petition concludes with a prayer for judgment, for possession of and title to the lands, for a decree canceling each of the certificates and patents described and removing the cloud cast upon the title by the location and survey thereof, for damages, costs and general relief.

The first step taken by defendant in the cause was to file a petition to remove the cause to the United States Circuit Court for the Western District of Texas. We shall discuss hereafter the rights of defendant under this petition, which was accompanied by proper bond, etc. Suffice it to say, now, that the application to remove was denied, and the defendant company was compelled to proceed with the cause in the State Court. The defenses to the suit were then presented by a demurrer, plea and answer. The demurrer was a general one to the effect that the petition was wholly insufficient to show that the State was entitled to recover from

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the defendant in the manner and form as alleged. The plea averred that, on June 11, 1880, the defendant railway company, as party of the first part, made, executed and delivered to Andrew Pierce and George P. Stone, trustees, as parties of the second part, a second mortgage and deed of trust upon the main line of its railroad as then constructed from Harrisburg and Houston, in Harris County, to San Antonio, in Bexar County, in the State of Texas, a distance of about 225 miles, together with all the franchises and rights, so far as necessary to the proper enjoyment of the road between the points named, and also upon "all and singular the lands, locations, surveys, "land scrips and rights to lands that have been or "may be hereafter acquired by said party of the "first part for the construction of its main line of "railroad from Harrisburg and Houston to San "Antonio, by virtue of any general or special Acts "of the Legislature making donation of public "lands," etc.; that Andrew Pierce was dead and George F. Stone was sole surviving trustee under the mortgage; that said deed of trust was given to secure the second mortgage gold bonds of the defendant company in a series of 1,000 bonds of $1,000 each, numbered from 1 to 1,000,

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inclusive, which mortgages were and are still subsisting, outstanding and unpaid; that said defendant company was fully authorized by its charter and the laws of Texas to issue said bonds and to mortgage its land grants, as aforesaid, for the purpose of building, constructing and equipping its railroad; that said mortgage bonds constituted a lien upon the lands in controversy to such an extent and in such a way that any decree rendered in this cause would affect said bonds and security and the interests of the holders to such an extent that defendant believed, and so alleged, that the surviving trustee of the bonds was a necessary party to the cause; that said bonds, to the amount of one million dollars, were issued for valuable consideration, prior to the institution of this suit, under laws of Texas authorizing the same, and that all of said bonds were still outstanding and in the hands of *bona fide* holders for value; that said mortgage was duly recorded, prior to the institution of this suit, in the counties in which the lands in question are situated, giving constructive notice thereof to the world and particularly to the State. The defendant company, therefore, pleaded the non-joinder of George F. Stone, a necessary party to the cause, and prayed

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that the cause be abated unless the said Stone, as trustee as aforesaid, be made a party to the suit under proper terms to be prescribed by the Court.

After reservation of the benefits of the demurrer and plea the defendant answered, denying the allegations of the petition except as to special admissions. It admitted that it had received all the certificates described in plaintiff's petition, and admitted the correctness of the description therein contained. The answer then set up and pleaded defendant's legislative charter and its amendments, and the special and general laws under which it claims to be entitled to the land certificates and patents attacked; viz., the Act of February 11, 1850, incorporating the Buffalo Bayou, Brazos and Colorado Railroad Company, and the amendatory acts of January 31st, 1852, January 29th, 1853, and February 4th, 1854; the General Land Grant Act of January 30th, 1854, and the legislation extending its lifetime to ten years after November 13, 1866; the Act of July 27, 1870, changing the name of the railway company to the name it now bears, and conferring certain rights and imposing onerous burdens; the Act of March 10, 1875, extending the time for the completion of the road to San Antonio; Article 10, Section 6, of the

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State Constitution of 1869, and the amendment thereof, adopted March 19, 1873; the General Land Grant Act of August 16, 1876, and the repealing Act of April 22, 1882. We shall presently give the substance of the special and general laws and constitutional provisions affecting this case. The answer then averred that defendant was entitled to the lands, and to have title vested in it, for the following reasons: (1) Because it was entitled to said lands by force and virtue of its legislative charter and the amendments thereto and by virtue of the general laws pleaded, passed prior to the Constitution of 1869, and it averred that its rights thereunder were not intended to be affected and could not be affected or impaired by the prohibition contained in Article 10, Section 6, of the Constitution of 1869, the same being within the protection of Section 10, Article 1, of the Constitution of the United States and the Fourteenth Amendment thereof. (2) Because, were it otherwise, it was still entitled to said lands by virtue of the Act of the Legislature of July 27th, 1870, specially pleaded, and by virtue of the amendment of Article 10, Section 6, of the Constitution of 1869, voted in 1872, and approved March 19th, 1873, said constitutional

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amendment relating back as of the date of the adoption of the Constitution of 1869, and removing all constitutional inhibitions against legislative grants of land in aid of railroad companies, and giving full force and effect to the provisions of said Act of 1870 and prior legislation. (3) Because it was entitled to said lands by force and virtue of the provisions of Section 11 of said Act of July 27th, 1870, and by reason of the fact that, subsequently to the amendment to the Constitution made in 1873, the Legislature of the State of Texas proceeded to and did make numerous and specific grants of 16 sections of land per mile of completed road to other roads in this State, and defendant, relying upon said provision in its charter, commenced and continued the construction of its road thereafter in good faith and in reliance upon the recognition and performance on the part of the State of its obligation to accord to defendant equal rights with other roads in favor of which several land grants of 16 sections of land to the completed mile of road had been made. (4) Because, if it were not otherwise entitled thereto, it was entitled to have and to hold said lands by virtue of the provisions of the Act of August 15th, 1876, and by reason of the fact

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that, on the faith of and in reliance upon the provisions of said act, the defendant railway company constructed that portion of its road between San Antonia and El Paso, consisting of 623.14 miles, and it averred that it thereby became entitled to receive from the State 16 sections of land for each mile of said completed road, aggregating 6,380,953.6 acres, and that, if not otherwise entitled to the land sued for by the State, it was entitled to receive and hold the same as part of the land earned by it by the construction of its road as aforesaid between San Antonio and El Paso, which portion of its road was constructed subsequent to August 15th, 1876.

The answer further averred that the decisions of the Governor of the State of Texas, required as a prerequisite to the issuance of land certificates—that the defendant company had done all the necessary antecedent acts and performed all the conditions precedent to a right to receive said lands—were conclusive against the State, the Governor having been, by the various legislative acts before pleaded, constituted the sole and final judge whether or not such antecedent acts and conditions had been performed, and that the certificates of the Commissioner of the General Land Office and

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the surveys thereunder, pursuant to the findings and decisions of the Governor of the State, vested a full and perfect title to the lands in the defendant company. It was further set up and claimed that, by reason of the construction placed upon its charter and the general laws of the State by all the departments of the State Government, and by reason of the said grants of land, credit was given to the defendant company in the money markets of the world, and it was enabled to raise and procure money for the purpose of constructing and extending its railroad by the mortgage of the lands now sued for, which lands formed a most important element in the credit originally obtained by it in disposing of its bonds secured by deed of trust thereof; that during more than ten years the State and her officers stood by and allowed the assertion of title by the defendant company to said lands, whereby credit was obtained as aforesaid, and they were therefore estopped by laches from setting up any title thereto; that the demand of the State was a stale demand; and laches, stale demand and estoppel were specially pleaded in bar of the State's claim.

The defendant company further averred in its answer that, after the passage of the General Land

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Grant Act of August 16, 1876, which unquestionably conferred upon it a right to sixteen sections of land for each mile of road subsequently constructed, it undertook, in reliance upon the good faith of the State and in consideration of her promised aid, the costly enterprise of extending its railroad from San Antonio to El Paso in the State of Texas, a distance of over six hundred miles; that it had nearly completed its road for the entire distance and had earned the right to land certificates and patents for over six million acres of land, when, the work having been done and the benefits secured to the State, the Act of April 22, 1882, was passed by the Legislature of the State, repealing all land grants in aid of railroads; that, at the date of the passage of the Act of 1882, it had actually completed and had in running order enough miles of road, constructed subsequent to August 16, 1876, to entitle it to lands far exceeding in amount and value the lands claimed from it by the State; that the State, acting in the grossest bad faith and in utter disregard of the rights of the defendant company, refused to issue to it any land certificates or to recognize in any way its rights to the lands which it had earned by the construction of its road west of San Antonio as

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aforesaid, basing its refusal upon the repealing act of April, 1882. The answer charged that the Act of 1882 was unconstitutional, null and void, being violative of Section 10 of Article 1 of the Constitution of the United States, and of Section 1 of Article XIV. of the amendments thereof, because it impaired the obligations of the contract between the State and the defendant company, growing out of the offer of State aid in land held out in the Act of August 15, 1876, and the acceptance of that offer by the defendant and the construction of its railroad in reliance thereon, and because it divested the defendant company of its vested right to receive the land which it had earned by the construction of its road before the passage of the act. The rights of the defendant company growing out of the extension of its road to El Paso, under the circumstances above stated, and the conduct of the State in respect thereto, are set up in the answer both as an equitable defense to the State's demand and by way of counter-claim and set-off.

After the filing of the responsive pleadings of defendant in the Court below, the plaintiff State filed what is styled "Plaintiff's First Supplemental Petition." This pleading suggests, by way of ex-

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ception to certain portions of the answer and prayer to have the same stricken out, the position of the State in respect to the defenses set up in the answer, and it is unnecessary now to deal with it in detail. The State also pleads by way of estoppel the argument of a former attorney for the defendant company in a former litigation between the State and the company. This plea was excepted to in a supplemental answer. To avoid confusion we shall present a separate argument upon the plea of estoppel at the close of this brief.

The nature of this suit and the main issues involved may be briefly summarized as follows: The State seeks to recover lands granted to the railway company in consideration of the construction of its railroad. The grounds of recovery are that the State, acting through its Governor and its Land Department, made a mistake many years ago when it considered that the railway company was entitled, under its legislative charter and the amendments thereto and the general laws of the State on the subject, to receive the land certificates in question for the portion of the railroad concerned, namely, that portion lying between the Colorado and Guadalupe Rivers, constructed subsequent to the Constitution of 1869

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and prior to the last General Land Grant Act of August 15, 1876, because, it is claimed, whatever rights to State aid in land the railway company might have had under its charter or the general laws was destroyed by a provision of the Constitution of 1869, prohibiting, it is claimed, all land grants in aid of railroads. The railway company answers that, under its charter and the amendments thereto and the general laws, it had a contract right to receive the lands which it had earned by the construction of its railroad, and that, if it was intended by the prohibition in the Constitution of 1869 to destroy its right to the land grant, then that provision of the Constitution is violative of the Constitution of the United States and is null and void. As an additional muniment of title, it pleads, in the alternative, its supplemental legislative charter of July 27, 1870, especially Section 11 thereof, which conferred upon it the same rights to a land grant as might be provided for any other railroad in the State, and in this connection it sets up the prompt repeal of the constitutional prohibition of 1869, the granting to other railroads of lands at the rate of sixteen sections per mile, and the fact that the portion of

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its road for which the lands in controversy were received was not constructed until after the repeal of the prohibition against railroad land grants and after the granting of State aid in land by the Legislature to other railroads in the State. The answer also sets up an equitable defense founded upon the general principle that, when a State voluntarily comes into court, she subjects herself to the jurisdiction of the Court to the same extent as any ordinary litigant, at least so far as concerns any and all legal or equitable defenses to her claim, and she can obtain equitable relief only when entitled to it upon principles of equity and good conscience; that when she comes into a court of equity she must come with clean hands, when she seeks equity she must do equity, and she can never expect a court of conscience to grant her relief in respect to a demand which is contrary to equity and good conscience. Under this defense it is alleged that on August 16, 1876, the State passed an act to encourage the construction of railroads, and promised sixteen sections of land for each mile of road constructed under the conditions of the act; that the defendant railway company thereupon extended its road from San Antonio to El Paso at enormous cost, in the just

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expectation of the faithful performance by the State of her promised aid in land, and by the construction of its road to El Paso, in all respects in compliance with the requirements of the Act of 1876, the company earned and became entitled to receive land certificates and patents for over six million acres of land ; but that the State unjustly and illegally repudiated her obligations and refused to issue the land certificates or to recognize the right of the railway company to the lands it had earned, basing her refusal upon the repealing act of April 22, 1882, which we charge to be violative of the Constitution of the United States. Defendant in the court below charges that on a fair accounting the State would owe it over ten times as much land as she now seeks to recover, and that her conduct in seeking to take from it several hundred thousand acres of land, when she owes it as many millions, is grossly unjust, unfair and oppressive, and is contrary to equity and good conscience. On this branch of the defense we shall contend that, if it (the railway company) is not otherwise entitled to the lands in question, its rights and claims under the Act of August 16, 1876, should be considered by the Court—at least so far as they consti-

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tute an equitable defense--and enforced—at least so far as they afford ground for dismissing the suit of the State, or conditioning the relief accorded her upon her doing justice to the railway company, or for quieting it in the possession of the land it now has.

Before discussing the decisions rendered in this case by State Courts, we shall give the substance of the special and general laws and the Constitution of Texas, which are referred to in the pleadings, so far as they bear upon the case. They will be found printed in full in the appendix to this brief.

The Act of February 11th, 1850, incorporated the Buffalo Bayou, Brazos and Colorado Railroad Company, conferring upon it the usual franchises and powers of a railroad corporation. The Act of September 4th, 1850, legalized the organization of the corporation. The Act of January 31, 1852, amended the charter of the company in respect to matters not material to his litigation. The Act of January 29, 1853, defined the route of the railroad the company was authorized to construct, as follows: "Commencing at a suitable point on "Buffalo Bayou, in the County of Harris, and "thence running by such course, and to such point

" or points at or near the Brazos and Colorado Riv-
" ers, or across the same, as said company may deem
" advisable, with the privilege of making, owning
" and maintaining such branches to said road as
" they may deem expedient." This act also pro-
vided " that there shall be granted to said com-
" pany eight sections of land of six hundred and
" forty acres each for every mile of railway actu-
" ally completed and ready for use," and also pre-
scribed the formalities to be observed in order to
obtain land certificates as the road was con-
structed.

On January 30th, 1854, the Legislature passed a general land grant act, entitled " An Act to en-
" courage the construction of railroads in Texas by
" donation of lands," Section 1 of which provides
" that any railroad company chartered by the
" Legislature of this State, heretofore or hereafter
" constructing within the limits of Texas a section
" of twenty-five miles or more of railroad, shall be
" entitled to receive from the State a grant of 16
" sections of land for every mile of road so con-
" structed and put in running order." Railroads applying for land under this act were required by Section 3 to cause the land to be surveyed into sections of 640 acres each, and in square blocks of

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not less than six miles, unless prevented by previous surveys or a navigable stream, which survey should be delineated upon a map or maps, the even and odd sections being differently colored and regularly numbered from one upward to the full number contained in the block, and the field notes of the survey and map or maps should be deposited with the Commissioner of the General Land Office. Section 6 provides "that "any railroad company having completed and put "in running order a section of twenty-five miles or "more of its road may give notice of the same to "the Governor, whose duty it shall be to appoint "some skillful engineer, if there be no State Engi- "neer, to examine said section of road, and if, upon "the report of the said engineer, under oath, it "shall appear that said road has been constructed "in accordance with the provisions of its charter "and of the general laws of the State in force at the "time regulating railroads, thereupon it shall be "the duty of the Commissioner of the General Land "Office to issue to said company patents for the "odd sections surveyed in pursuance of the second "and third sections of this act; but in case said "lands, or any part thereof, shall not have been "surveyed at the time said section is completed,

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" then it shall be the duty of said Commissioner to " issue to said company certificates of 640 acres each, " equal to sixteen sections per mile of road so com- " pleted, whereupon said company may apply to the " district surveyor of any land district in this State to " survey any quantity of vacant land subject to loca- " tion and entry in said district, not to exceed twice " the quantity of certificates so issued, which cer- " tificates shall be made, numbered and colored as " directed in the third section of this act; and, upon " the return of the field notes and map or maps of " such surveys to the General Land Office and the " certificates so issued, it shall be the duty of the " Commissioner to issue to said company patents for " the odd sections of said surveys; provided that, in " case the surveys are not applied for before the " completion of any section of road, it shall not be " necessary to deposit with the treasurer a bond " as required in the second section of this act." Section 11 provides that all the alternate or even sections of land surveyed in pursuance to the provisions of this act shall be reserved to the use of the State and not liable to locations, entries or preemption privileges until otherwise provided by law. Section 12 provides, in effect, that the provisions of the act shall not entitle any railroad

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company, having a right to a land grant under its existing charter, to receive more than sixteen sections of land for one mile of completed road. It was further provided that the act should continue in force for ten years from the time it took effect, and no longer. On the same day, the general land grant act was amended by an act which provided that no railroad company benefited by the act should receive any donation of land under its charter, or under the act of which this is a supplement, for any work not done within ten years after the passage of the act.

By the Act of February 4, 1854, amending the charter of the Buffalo Bayou, Brazos and Colorado Railroad Company, it was provided that the company should be "entitled to all the rights, privi- " leges and benefits accruing from any general law " or laws that have or may be hereafter passed by " this State to encourage the construction of rail- " roads, in the same mannerand to the same extent " as if the gauge of said road was the same now " fixed, or which may be hereafter fixed, upon by " this State." On the same day another and a separate act was passed containing only two sections, of which the following is a copy:

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"SECTION 1. Be it enacted by the Legisla-
" ture of the State of Texas, that if the Buffalo
" Bayou, Brazos and Colorado Railroad Com-
" pany shall avail themselves of the act to
" which this is a supplement, or accept
" any donation of land from the State,
" they shall not be entitled to receive any
" such donation from the State under the
" provisions of this law or any law that has
" heretofore been passed for their benefit, for
" any portion of their road which shall not
" be completed and ready for use within ten
" years from and after the passage of this act;
" provided that said company shall restrict
" themselves to the following route; viz., to an
" extension of their existing road to Austin,
" in the County of Travis, crossing the Brazos
" River at any point between the Town of
" Richmond, in Fort Bend County, and Hi-
" dalgo, in Washington County, and with the
" right of extending their road from Austin
" to connect with any road running north of
" Austin towards the Pacific Ocean. Provided,
" such connections be made between the
" ninety-sixth and ninety-eighth parallels
" of longitude; and provided, further, that
" said company shall have no right to build
" branches from their main road.

"SECTION 2. This act shall take effect from
" and after its passage."

By an act approved January 11th, 1862, it was provided that the time of the continuance of the

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war between the Confederate States and the United States should not be computed against any internal improvement company in reckoning the period allowed them in their charters, by any law, general or special, for the completion of any work contracted by them to be done. By another act of the same date, entitled "An Act for the relief of railroad companies," it was provided that the failure of any chartered railroad company to complete any section, or fraction of section, of its road, as required by existing laws, should not operate as a forfeiture of its charter, or of the lands to which it would be entitled under the Act of January 30th, 1854, and the several acts supplementary thereto, provided it should complete such section, or fraction of section, as would entitle it to donations of land under existing laws within two years after the close of the war.

By a general act entitled "An Act for the bene-
"fit of railroad companies," approved November 13, 1866, it was, among other things, provided that "the grant of sixteen sections of land to the mile
" to railroad companies heretofore or hereafter con-
" structing railroads in Texas shall be extended,
" under the same restrictions and limitations hereto-

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" fore provided by law, for ten years after the pas-
" sage of this act."

Section 6, article X, of the Constitution of 1869, reads as follows:

> "The Legislature shall not hereafter grant
> " lands to any person or persons, nor shall
> " any certificates for land be sold at the Land
> " Office except to actual settlers upon the
> " same, and in lots not exceeding one hundred
> " and sixty acres.."

This Constitution of the State, adopted in 1869, and known as the "Constitution of 1869," took effect on the date of its acceptance by Congress, which was March 30, 1870, as decided in Grigsby vs. Peak, 57 Tex., 142, or on the date of its adoption, which was December 3, 1869, as subsequently decided in Peak vs. Swindell, 66 Tex., 242.

On the 27th day of July, 1870, the Legislature of the State of Texas passed an act entitled " An Act supplementary to the act to incorporate " the Buffalo Bayou, Brazos and Colorado Rail-" road Company, and of the other special acts " relating to said company." The preamble of this act, which recites important facts, is as follows:

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"Whereas, on the eleventh of July, 1868, "'the roadbed, track, franchise and chartered "'rights and privileges' of the Buffalo "Bayou, Brazos and Colorado Railroad Com- "pany were sold on executions, issued on "judgments against said company, and on the "twenty-fourth January, 1870, the railroad "of said company from Harrisburg to Alley- "ton, and its franchise, rights and other "property appertaining thereto, was sold "under the provisions of a mortgage or deed "of trust made by said company on the first "of November, 1860, all of which appears "of record; and, whereas, the Act of "December 19, 1857, 'supplementary to and "'amendatory of an act to regulate railroad "'companies,' provides that the purchasers at "such sales, and their associates, 'shall be en- "'titled to have and exercise all the powers, "'privileges and franchises granted to the "'company sold out by its charter, or by vir- "'tue of the general laws of this State;' and "'shall be deemed and taken to be the true "'owners of said the charter, and corporators "'under the same, and vested with all "'powers, rights, privileges and benefits "'thereof;' and, whereas, the purchasers at "said sales, and their associates, have formed "a new company under said old name, and "have expended large sums of money in the "construction of said railroad, in the pur- "chase and completion of the Columbus Tap "Railroad, and the bridge of the Brazos

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"Iron Bridge Company over the Brazos "River at Richmond; and, whereas, said new "company desires to be distinguished by "name from said 'sold-out' company, to "consolidate its property and to extend said "line of railroad."

Section 1 of the act provides:

"That the new company heretofore known "as the 'Buffalo, Bayou, Brazos and Colorado "'Railway Company,' referred to in the pre- "amble of this act, shall be hereafter known by "the corporate name of 'The Galveston, Har- "'risburg and San Antonio Railway Com- "'pany,' and may alter its seal to conform to "its name; provided, that said new company "shall be liable to the State of Texas for the "debt of said 'sold-out' company for loans "made to the latter company from the "special school fund, in the same manner "and to the same extent as said 'sold-out' "company was liable, and that said change "of name shall in no respect impair or affect "said liability or the existing lien or mortgage "of the State upon the railroad of said com- "pany as security for said loans. Also pro- "vided, that said change of name shall in no "respect impair or affect any of the obliga- "tions of said new company or other parties, "or the obligations of other parties to said "new company; all of which may be enforced "by or against said new company under said "new name."

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Section 3 of the act provides:

"That said new company is hereby authorized to extend the existing line of railroad owned and operated by said company, from Columbus, in Colorado County, to San Antonio, in the County of Bezar, within four years from the passage of this act, and thence to a terminus on the Rio Grande, by such route as the directors shall deem most feasible, with a branch from the most suitable point to New Braunfels, in Comal County, within four years from the passage of this act, or said new company may connect with any line of railroad that may be constructed or under construction to San Antonio or the Rio Grande, south of latitude of the City of Austin and the Colorado River instead of building, its own line beyond the point of such connections, and may build and connect with any line of railroad that may be constructed or under construction, and designed to form part of any railroad line to the Pacific, south of the thirty-fifth parallel of latitude; nothing herein being so construed as to exclude said new company from the right to construct; also any part of the line up the Colorado Valley formerly designated by said 'sold-out' company as its route under the provisions of the eleventh section of the Act of December 19th, 1857; provided, that if the said road shall not be completed within the time specified in this

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"section, then this charter shall be for-
"feited."

Section 8 provides:

"That in case it shall be made to ap-
"pear to the Governor that there has
"not been issued upon said railroad the
"full quantity of sixteen sections of land
"scrip for every mile of the same that
"was constructed and put in order prior to
"the war of the late rebellion, in accordance
"with the provisions of the charter and of
"the general laws of the State in force at
"the time regulating railroads, there shall be
"issued to said new company said scrip to
"the amount of any such deficiency, notwith-
"standing said railroad may not have been
"constructed and completed at the rate of
"twenty-five miles each year after the con-
"struction of the first twenty-five miles, as
"provided in the Act of January, 1854."

Sections 11 and 12 of the act read as follows:

"SECTION 11. That said new company
"shall be entitled to the same or simi-
"lar rights and relief, except State aid in
bonds "~~lands~~, or endorsement of or guarantee of in-
"terest on bonds granted to or provided for
"any other railroad company by the Legis-
"lature, and upon the same or similar terms
"and conditions so far as such rights and
"relief are, in their character, applicable to
"said new company or its lines of railroad.

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"SECTION 12. That nothing in this act shall "be so construed as to deprive any party in- "terested of the right to disprove any assumed "fact stated in the preamble; provided, that "nothing in this act contained shall be con- "strued as reviving or renewing any land "grant to said company for road hereafter to "be completed which it does not possess by "existing law."

Section 6 of Article X. of the Constitution of 1869, above quoted, was amended by resolution passed by the Legislature of Texas on May 17, 1871, and the amendment was adopted by a vote of the people of the State on the 5th, 6th, 7th and 8th days of November, 1872, and was ratified by the Legislature of March 19th, 1873. The amendment became effective on that date and removed the restriction imposed upon the granting of land in aid of railroads. The section, as amended, reads as follows:

"SECTION 6. The Legislature of the State of "Texas shall not hereafter grant lands, ex- "cept for purposes of internal improvement, "to any person or persons, nor shall any cer- "tificate for land be sold at the Land Office "except to actual settlers upon the same, "and in lots not exceeding one hundred and "sixty acres; provided, that the Legislature "shall not grant, out of the public domain,

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" more than twenty sections of land for each
" mile of completed work in aid of the con-
" struction of which land may be granted,
" and provided, further, that nothing in the
" foregoing proviso shall affect any rights
" granted or secured by laws passed prior to
" the final adoption of this amendment."

On August 16, 1876, the Legislature, under ample authority conferred by the Constitution of 1876, passed a general law entitled " An Act to " encourage the construction of railroads in Texas " by the donation of lands," whereby it was provided that any railroad theretofore chartered or which may be thereafter organized under the general laws of the State should, upon the completion of a section of ten miles or more of its road, be entitled to receive, and there was thereby granted to every such railroad company from the State, sixteen sections of land for every mile of its road so completed and put in running order. The act prescribed the usual formalities for ascertaining compliance on the part of railroad companies with the provisions of the act, the issuance of certificates, etc.

On April 22, 1882, the Legislature passed an act repealing all laws in force granting lands for the construction of railroads.

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There is a stipulation in the record to the effect that the charters and special laws relating to the defendant railway company and relating to grants of land to railroad companies may be used and considered in evidence, on any trial or hearing of the cause, as well as all special laws incorporating railroads and other laws, general and special, granting lands and land certificates for works of internal improvements (Printed Record, p. 93; See, also, Conclusions of Fact of the Court of Civil Appeals, Printed Record, p. 120); and Decision of State Supreme Court on Certified Questions, Printed Record, p. 112, and the case of G., H. & S. A. Ry. Co. vs. State, 81 Texas, 572, where this mode of making special legislation a part of the record was sanctioned.

The District Court overruled the demurrer and the plea of the defendant, and gave judgment on the merits in favor of the State, adjudging that the certificates and patents described in the petition had been issued without warrant or authority of law, and decreeing that they be canceled and held for naught, and that the cloud cast upon the title of the State to the lands located and surveyed thereunder be removed. From this judgment the defendant prayed and was allowed an appeal to

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the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas.

The Court of Civil Appeals found that there were certain issues of law involved in the case which it deemed advisable to present to the Supreme Court for adjudication, and, accordingly, the following questions were certified to that Court :

> " QUESTION 1. Did Section 6, Article 10, of " the Constitution of 1869 repeal all laws " giving railroad companies the right to earn " lands from the State by the construction of " railroads; and, if so, would this repeal " apply as well to the right to earn lands " given through charters as through general " laws? QUESTION 2. If the above be an- " swered in the negative, did appellant suc- " ceed to the rights of the Buffalo Bayou, " Brazos and Colorado Railroad Company by " virtue of the special Act of 1870, said Buf- " falo Bayou, Brazos and Colorado Railway " Company being restricted by special Act of " February 4th, 1854, to run its line to " Austin? QUESTION 3. If the laws as to " the land grants to railroads passed prior to " 1869 were repealed by the Constitution of " that year, can appellant interpose and " maintain in this suit the equitable defense " that, if the certificates issued for that por- " tion of the road between the Colorado and

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"Guadalupe Rivers from 1870 to 1876 were "illegally obtained, the State is in no "position to ask the relief sought by reason "of the fact that appellant has earned cer- "tificates for said 163 miles of road" [refer- "ring to the 163 miles from San Antonio "westward, begun, completed and in run- "ning order after the passage of the Act of "August 15, 1876, and before the attempted "repeal thereof on April 22, 1882]? "QUES- "TION 4. If the last question be affirmatively "answered, would the fact that, at the time "the land for the 163 miles west of San "Antonio was earned by appellant, the pub- "lic lands were exhausted affect the equities "of the case?" (Printed Record, p. 111.)

In answering these questions, the only information about the case which the Supreme Court had before it was the following brief statement of the case, which accompanied the certified questions:

"The State of Texas instituted suit "against appellant to cancel certain land cer- "tificates and patents issued by the State to "appellant for land, amounting to 879,- "078 $\frac{1}{2}\frac{1}{0}$ acres. It was alleged and proved "that the certificates and patents were issued "to the Galveston, Harrisburg and San An- "tonio Railway Company for a portion of its "railroad constructed between the Colorado "River and Guadalupe River, between the "time of the adoption of the Constitution of

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" 1869 and the passage of the Act of August
" 16th, 1876 (Acts 4267 to 4277, Rev.
" Stats.). On July 27, 1870, by special Act
" of the Legislature, appellant was chartered
" and recognized as the successor of the Buf-
" falo Bayou, Brazos and Colorado Railway
" Company. After the passage of the Act
" of August 16th, 1876, and before its repeal
" in 1882, appellant constructed about 163
" miles of railroad from San Antonio west-
" ward towards El Paso, for which the State
" refused to issue land certificates, the Gov-
" ernor refusing the application for inspec-
" tion, on May 22, 1882, on the ground that
" the law granting certificates has been re-
" pealed " (Printed Record, p. 110).

The answer of the Supreme Court to the certified questions will be found in the printed record, pages 111 to 117. The first question was not answered, the Court being of the opinion that its answer to the second question made an answer to the first unnecessary. In answering the second question, the Court said that it would consider the special laws relating to the defendant railway company as forming part of the record and properly before the Court. It was conceded in the opinion that the Buffalo Bayou, Brazos and Colorado Railroad Company was entitled under its special charter and the amendments thereto to

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the land grant provided by the general law of January 30, 1854; but that, until the passage of the special Act of July 27, 1870, it was subject to the restrictions with respect to its route imposed by the second special Act of February 4, 1854. It was also conceded that the general land grant law of January 30, 1854, was kept alive by the legislation of 1862, and was in force when the Act of November 13, 1866, extending it for ten years, was passed, and that the latter act had the effect to continue in force the Act of January 30, 1854, for ten years from November 13, 1866. The Court also conceded that the purchasers of the Buffalo Bayou, Brazos and Colorado Railway Company, who, by the special Act of July 27, 1870, were allowed a change of corporate name to that of the Galveston, Harrisburg and San Antonio Railway Company, acquired under the law all the rights, franchises, privileges, chartered powers, corporate existence, etc., of the "sold-out" company, including the right to a land grant. It was also conceded that it was perfectly competent for the Legislature in 1870 to authorize the change of route it did authorize, and to remove the restrictions as to route imposed by the second special Act of February 4, 1854, and "that, as long as the general law which

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" granted the privileges of acquiring land re-
" mained in force, and so long as no constitutional
" inhibition stood in the way, legislative authority
" to a company to change the line to be constructed
" should be construed to carry with it the privi-
" lege of earning lands for the construction of the
" new line." But the Court held that the prohibition in Section 6, Article 10, of the Constitution of 1869, blocked the way and defeated the right of the defendant railway company, which would otherwise have existed, to a land grant for its road constructed along the new route; and, in so holding, the Court gave effect to a provision of the State Constitution which, so far as it had such effect, defendant had specially set up and claimed to be in violation of the Constitution of the United States. As we shall endeavor to show hereafter, the railway company's right to receive a donation of land for the construction of the portion of its road in question owes its existence to legislation prior to the special Act of 1870, and to the Constitution of 1869. By merely authorizing an existing railroad corporation to build a branch line, or to extend its road, or to change its route, the Legislature cannot be said to thereby create anew all the corporate rights and franchises which the cor-

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poration, under its charter, may enjoy and exercise upon or in respect to the branch or extension or changed line. The original grant of the corporate rights and franchises necessarily included the right to enjoy them in respect to any physical property which the company might acquire under existing or future legislation. When a Legislature authorizes a pre-existing railroad company to build an extension or alter its route, all that company's corporate rights and franchises are extended to and operate upon the extension or changed line to the same extent as if it were a part of the original road, and this, not by force of the legislation authorizing the extension or altered route, but by reason of the pre-existence of those corporate rights and franchises, by force of the original grant which created them. Hence, their existence and enjoyment in reference to the new road is not affected by limitations upon the power of the Legislature at the time the extension or change of route was authorized. It follows from the foregoing that Section 6, Article 10, of the Constitution of 1869, as construed by the Supreme Court of Texas, abridged and impaired rights of a contract nature, to which the railway company was entitled under prior laws, and it is, therefore,

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violative of the contract clause of the Federal Constitution.

The Supreme Court disposed of the third question in a very summary manner, answering it in the negative. The information afforded it by the certified questions was so meagre that the Court naturally misapprehended the nature of the defense intended to be covered by the third question and disposed of it in a few lines. It held that the mere right to receive certificates for the additional road west of San Antonio, constructed under the Act of 1876, conferred no title to the lands in controversy, since they had not been surveyed or patented under any certificates granted for the additional road, and that it knew of no case "in "which it has ever been ruled that the claimant "of land against the State, under a location made "by virtue of a void certificate, has any equity in "the premises by reason of being the possessor of "another valid certificate" (Printed Record, p. 117). As the defense intended to be referred to in the third question involves a Federal question, we shall have occasion to present it more fully in another portion of this brief. Your Honors will then see how inadequately it was dealt with in the certified questions of the Court

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of Appeals and in the answer thereto of the Supreme Court. The third question not having been answered in the affirmative, no occasion for answering the fourth arose.

The case then went back to the Court of Civil Appeals. That Court rendered a decision which will be found on pages 119–130 of the printed record. For its conclusions of fact it adopted, with slight changes, the agreed statement of facts filed in the lower Court. In its opinion it gave a résumé of the petition and answer, and then briefly ruled upon the following matters of defense: First, the application to remove the cause to the Federal Court, which it held was properly denied upon the authority of State of Tennessee vs. Bank of Commerce, 152 U. S., 454; second, the plea of non-joinder of George F. Stone, trustee in the mortgage, which it held was properly overruled, on the ground that mortgagees are not necessary parties to actions of trespass to try title brought against mortgagors; third, the defense, founded on the effect by way of estoppel of the acts of the Governor and Land Department in issuing the certificates in question, which it decided against the railway company on the ground that the State cannot be estopped by the

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acts of any of its officers done in the exercise of a power not conferred upon them any more than it can be bound by contracts which they were not empowered to make. Having passed upon these matters of defense, the decision or opinion closes as follows:

> "The questions raised by the remaining
> " assignments of error have been certified
> " by this Court to the Supreme Court, and
> " have been answered adversely (G. H. &
> " S. A. Ry. Co. vs. The State of Texas,
> " opinion delivered March 19, 1896). In
> " that opinion it was held that appellant did
> " not succeed to the rights that would have
> " accrued to the Buffalo Bayou, Brazos and
> " Colorado Railroad had it been extended, as
> " provided by its charter, to Austin, and
> " that it was no defense to the action for the
> " recovery of the lands involved in this
> " suit that the company may have been
> " entitled to certificates for the 163 miles of
> " railroad constructed west of San Antonio
> " under the law of 1876."

The assignments of error referred to by the Court of Civil Appeals are eighteen in number and will be found on pages 104–108 of the printed record. A comparison of them with the certified questions and answers thereto will not support the statement of the Court of Appeals that all the

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questions presented by the assignments of error, except the three disposed of by that Court, have been answered by the Supreme Court. For instance, how could the Supreme Court, which could have no knowledge of the matters of controversy except from the certified questions, know that such a question as that raised in the seventh assignment of error (p. 106) had been raised by defendant. The defense based on Section 11 of the defendant's charter may not be well taken, and that provision of the special Act of 1870 may be a dead letter, but certain it is that neither the Supreme Court nor the Court of Civil Appeals have ever passed upon it. Like many other matters of defense, it was lost somewhere in carrying the case back and forth between the two courts.

After ineffectual attempts to secure a rehearing from the Court of Civil Appeals and a writ of error to that Court from the Supreme Court, the plaintiff in error, defendant in the court below, sued out a writ of error from this Court, which was allowed by the Presiding Justice of the Court of Civil Appeals. The errors assigned in support of this writ of error will be found on pages 165–169 of the printed record.

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They are as follows:

" FIRST.

" The court of civil appeals erred in over-
" ruling and holding not well taken appel-
" lant's first and second assignments of
" error, each of which complained, in effect,
" of the action and ruling of the district
" court of Brewster county in refusing ap-
" pellant's application to remove this cause
" into the circuit court of the United States,
" and in proceeding with this cause after the
" presentation of the petition and bond for
" such removal.

" SECOND.

" That said court of civil appeals erred in
" overruling and holding not well taken
" appellant's fifth assignment of error, and
" in deciding that the special acts of the
" legislature of the State of Texas approved
" February 11th, 1850; September 4th,
" 1850; January 29th, 1853; February 4th,
" 1854, and July 27th, 1870, chartering and
" amending the charter of plaintiff in error
" railway company, and the general acts of
" the legislature of the State of Texas ap-
" proved January 30th, 1854; January 11th,
" 1862, and November 13th, 1866, and the
" acceptance of said laws, and the construc-
" tion by plaintiff in error railway company
" at large expense of an important part of
" its line of railway prior to the adoption of

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" the constitution of Texas in 1869, and the
" completion of its entire line subsequently
" and in due time, did not constitute a valid
" contract between the State of Texas and
" said railway company, entitling said rail-
" way company and creating in it a vested
" right to lands granted by said laws and
" earned by said railway company there-
" under, including the lands involved in this
" suit, and in holding and deciding in effect
" that said contract could be and was im-
" paired, and the right of said railway com-
" pany to said land was divested by the
" constitution of Texas adopted in 1869,
" contrary to and in violation of the Consti-
" tution of the United States, and especially
" article 1, section X., thereof, and section 1,
" article XIV., of the amendments thereof.

"THIRD.

" The said court of civil appeals erred in
" not deciding that the special acts of the
" legislature of the State of Texas approved
" February 11th, 1850; September 4th,
" 1850; January 29th, 1853; February
" 4th, 1854, and July 27th, 1870, chartering
" and amending the charter of plaintiff in
" error railway company, and the general
" acts of the legislature of the State of
" Texas approved January 30th, 1854;
" January 11th, 1862, and November 13th,
" 1866, and the acceptance of said laws and
" the construction by plaintiff in error rail-

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" way company at large expense of an im-
" portant part of its line of railway prior to
" the adoption of the constitution of Texas
" in 1869, and the completion of its entire
" line subsequently and in due time consti-
" tuted a valid contract between the State of
" Texas and said railway company entitling
" said railway company and creating in it a
" vested right to the lands granted by said
" laws and earned by said railway company
" thereunder, including the lands involved
" in this suit, and in not holding and decid-
" ing in effect that said contract could not
" be, and was not impaired, and the right of
" said railway company to said land was not
" divested by the constitution of Texas
" adopted in 1869, and that in so far as said
" State constitution attempted to impair
" such contract and divest such right the
" same was and is contrary to and in violation
" of the Constitution of the United States,
" and especially article 1, section X. thereof,
" and section 1 of article XIV. of the
" amendments thereof, and therefore void.

" FOURTH.

" The said court of civil appeals erred in
" overruling and holding not well taken
" appellant's ninth assignment of error and
" in deciding that plaintiff in error railway
" company had not, under the general act of
" the legislature of the State of Texas ap-
" proved August 16th, 1876, by constructing

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" and completing its road between San An-
" tonio and El Paso, a distance of 623 miles,
" in consideration of the grant of sixteen
" sections of land made by said act for each
" mile of road so constructed, acquired a
" contract and vested right to and was en-
" titled to hold under the grant thus made
" the lands involved in this suit, which con-
" tract and vested right could not be im-
" paired or divested by the general act of
" the legislature of the State of Texas ap-
" proved April 22, 1882, and in not deciding
" that the last mentioned act which at-
" tempted to repeal the laws granting such
" lands to said railway company, was and is
" contrary to and in violation of the Consti-
" tution of the United States and especially
" article 1 of section X thereof and section 1
" of Article XIV or the amendments thereof,
" and could not, therefore, impair said com-
" pany's contract right or divest it of said
" lands.

" FIFTH.

" Said court of civil appeals erred in
" overruling and holding not well taken ap-
" pellant's tenth assignment of error and in
" deciding that plaintiff in error railway
" company had not, under the general act of
" the legislature of the State of Texas ap-
" proved August 16th, 1876, by constructing
" and completing its road between San An-
" tonio and El Paso, a distance of 623 miles,

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" in consideration of the grant of sixteen
" sections of land made by said act for each
" mile of road so constructed, acquired a con-
" tract and vested right to and was entitled
" to hold under the grant thus made the
" lands involved in this suit, which contract
" and vested right could not be impaired or
" divested by the general act of the legis-
" lature of the State of Texas approved
" April 22nd, 1882, and in not deciding that
" the last mentioned act, which attempted
" to repeal the laws granting such lands to
" said railway company, was and is contrary
" to and in violation of the constitution of
" the United States, and especially article 1
" of section X thereof and section 1 of article
" XIV of the amendments thereof, and could
" not, therefore, impair said company's con-
" tract right or divest it of said lands.

" SIXTH.

" Said court of civil appeals erred in over-
" ruling and holding not well taken appel-
" lant's eleventh assignment of error and in
" deciding that plaintiff in error railway
" company had not, under the general act of
" the legislature of the State of Texas ap-
" proved August 16th, 1876, by constructing
" and completing its road between San An-
" tonio and El Paso, a distance of 623 miles,
" in consideration of the grant of sixteen
" sections of land made by said act for each
" mile of road so constructed, acquired a

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" contract and vested right to and was en-
" titled to hold under the grant thus made
" involved in this suit, which contract and
" vested right could not be impaired or
" divested by the general act of the legis-
" lature of the State of Texas, approved
" April 22nd, 1882, and in not deciding that
" the last mentioned act which attempted to
" repeal the laws granting such land to said
" railway company was and is contrary to
" and in violation of the Constitution of the
" United States, and especially article 1 of
" section X thereof and section 1 of article
" XIV of the amendments thereof, and could
" not, therefore, impair said company's con-
" tract right or divest it of said lands.

" SEVENTH.

" Said court of civil appeals erred in over-
" ruling and holding not well taken appel-
" lant's thirteenth assignment of error and in
" deciding that plaintiff in error railway com-
" pany had not, under the general act of the
" legislature of the State of Texas approved
" August 16th, 1876, by constructing and
" completing its road between San Antonio
" and El Paso, a distance of 623 miles, in
" consideration of the grant of sixteen sec-
" tions of land made by said act for each
" mile of road so constructed, acquired a
" contract and vested right to and was en-
" titled to hold under the grant made the
" lands involved in this suit, which contract

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" and vested right could not be impaired or
" divested by the general act of the legis-
" lature of the State of Texas, approved
" April 22, 1882, and in not deciding that
" the last-mentioned act which attempted to
" repeal the laws granting such lands to said
" railway company was and is contrary to
" and in violation of the Constitution of the
" United States, and especially article 1 of
" section X thereof and section 1 of article
" XIV of the amendments thereof, and could
" not, therefore, impair said company's con-
" tract right or divest it of said lands.

" EIGHTH.

" Said court of civil appeals erred in
" overruling and holding not well taken appel-
" lant's fourteenth assignment of error and
" in deciding that plaintiff in error railway
" company had not, under the general act of
" the legislature of the State of Texas ap-
" proved August 16th, 1876, by constructing
" and completing its road between San An-
" tonio and El Paso, a distance of 623 miles,
" in consideration of the grant of sixteen
" sections of land made by said act for each
" mile of road so constructed, acquired a
" contract and vested right to and was en-
" titled to hold under the grant thus made
" the lands involved in this suit, which con-
" tract and vested right could not be im-
" paired or divested by the general act of
" the legislature of the State of Texas ap-

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" proved April 22, 1882, and in not decid-
" ing that the last-mentioned act, which
" attempted to repeal the laws granting
" such lands to said railway company,
" was and is contrary to and in violation of
" the Constitution of the United States, and
" especially of article 1 of section X thereof
" and section 1 of article XIV of the amend-
" ments thereof, and could not, therefore,
" impair said company's contract right or
" divest it of said lands.

" NINTH.

" Said court of civil appeals erred in
" overruling and holding not well taken
" appellant's fifteenth assignment of error
" and in deciding that plaintiff in error rail-
" way company had not, under the general
" act of the legislature of the State of Texas
" approved August 16th, 1876, by construct-
" ing and completing its road between San
" Antonio and El Paso, a distance of 623
" miles, in consideration of the grant of six-
" teen sections of land made by said act for
" each mile of road so constructed, acquired
" a contract and vested right to and was
" entitled to hold under the grant thus made
" the lands involved in this suit, which con-
" tract and vested right could not be im-
" paired or divested by the general act of
" the legislature of the State of Texas ap-
" proved April 22, 1882, and in not decid-
" ing that the last-mentioned act, which

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" attempted to repeal the laws granting such
" lands to said railway company, was and is
" contrary to and in violation of the Consti-
" tution of the United States, and especially
" article 1, section X, and section 1 of article
" XIV of the amendments thereof, and could
" not, therefore, impair such company's con-
" tract right or divest it of said lands.

"TENTH.

"Said court of civil appeals erred in
" overruling and holding not well taken
" appellant's seventeenth assignment of error
" and in deciding that plaintiff in error rail-
" way company had not, under the general
" act of the legislature of the State of Texas
" approved August 16th, 1876, by construct-
" ing and completing its road between San
" Antonio and El Paso, a distance of 623
" miles, in consideration of the grant of six-
" teen sections of land made by said act for
" each mile of road so constructed, acquired
" a contract and vested right to and was en-
" titled to hold under the grant thus made
" the lands involved in this suit, which con-
" tract and vested right could not be im-
" paired or divested by the general act of
" the legislature of the State of Texas ap-
" proved April 22, 1882, and in not deciding
" that the last-mentioned act, which at-
" tempted to repeal the laws granting such
" lands to said railway company was and is
" contrary to and in violation of the Consti-

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" tution of the United States, and especially " article 1 of section X thereof, and section 1 " of article XIV of the amendments thereof, " and could not, therefore, impair said com- " pany's contract right or divest it of said " lands.

" ELEVENTH.

" Said court of civil appeals erred in hold- " ing and deciding that plaintiff in error " railway company had not, under the gen- " eral act of the legislature of the State of " Texas, approved August 16th, 1876, by " constructing its road between San Antonio " and El Paso, a distance of 623 miles, in " consideration of the grant of sixteen sec- " tions of land made by said act for each " mile of road so constructed, acquired a con- " tract and vested right to and was entitled " to hold under the grant thus made the " lands involved in this suit, which contract " and vested right could not be impaired or " divested by the general act of the legis- " lature of the State of Texas approved " April 22, 1882, and in not deciding that " the last-mentioned act, which attempted to " repeal the laws granting such lands to said " railway company, was and is contrary to " and in violation of the Constitution of the " United States, and especially of article 1 " of section X thereof and section 1 of ar- " ticle XIV of the amendments thereof, and " could not, therefore, impair said com-

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" pany's contract right or divest it of said
" lands.

" TWELFTH.

" Said court of civil appeals erred in affirm-
" ing the judgment of the district court in
" and for Brewster county, whereby the
" State of Texas had and recovered the said
" lands from plaintiff in error, and in not
" reversing the said judgment."

In the argument which is to follow, assignments of errors Second and Third, which present different views of the same question, will be discussed together under heading I of the argument; assignments Fourth to Eleventh, inclusive, will be argued together under heading II, and the First assignment will be discussed under heading III. The First assignment of error, relating to the right to remove, will be presented out of its logical order, because a decision of that question requires a familiarity with the whole case, and can be more conveniently considered after the nature of the case has been fully shown by the argument upon the merits. In the argument of the branch of the case embraced by assignments Fourth to Eleventh, inclusive, will be found a full statement of the errors assigned

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in the State Court to which the assignments Fourth to Eleventh refer.

The errors relied on, other than the denial of the right to remove, may be summarized as follows:

1. Under its legislative charter and its amendments and the general laws, prior to 1869, plaintiff in error had a vested and a contract right to receive and hold the lands in question, and the State court erred in not so holding and in not holding that section 6 of Article X of the Constitution of the State of Texas of 1869, in so far as it could be construed as divesting or withdrawing or impairing or abridging plaintiff in error's right to the lands in controversy, was in violation of section 10 of Article I of the Constitution of the United States and of section 1 of the Fourteenth Amendment thereof.

2. The State court erred in not deciding that, after plaintiff in error had accepted the offer of State aid in land held out in the general act of August 15, 1876, and had manifested its acceptance by undertaking and constructing its six hundred miles of road between San Antonio and El Paso, it had earned a vested and contract right to receive the promised sixteen sections of

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land for each mile of road constructed, protected from divestiture or impairment by the federal constitution, and in not deciding that the repealing act of April 22, 1882, was null and void, because in violation of section 10 of article 1 of the Constitution of the United States and of section 1 of the Fourteenth Amendment thereof. In refusing to declare the unconstitutionality and nullity of the act of April 22, 1882, and in refusing to recognize the vested and contract nature of plaintiff in error's right to receive the land certificates to which it was entitled under the act of August 15, 1876, and in treating plaintiff in error's right to lands under the act of 1876 as too inchoate and imperfect to support the equitable defense based thereon, the State court gave effect to the act of April 22, 1882, inasmuch as that act, by preventing the governor and land department of the State from recognizing the railway company's rights in the premises, was alone responsible for any want of completeness in the title, or in the evidence of the title of the plaintiff in error to the lands withheld from it by the State. A correct decision of this federal question—*i. e.*, the unconstitutionality of the act of April 22, 1882, and the want of right in the State to avail

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itself of the incompleteness in the title or in the evidence of the title of plaintiff in error to the lands directly due to this unconstitutional act, is essential to a fair and correct appreciation of the equitable defense discussed, in connection with the federal question, under heading II of the argument.

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ARGUMENT.

I.

SECTION 6 OF ARTICLE 10 OF THE CONSTITUTION OF 1869, AS CONSTRUED BY THE STATE COURT, ABRIDGES AND IMPAIRS CONTRACT RIGHTS AND DIVESTS VESTED RIGHTS OF THE GALVESTON, HARRISBURG AND SAN ANTIONIO RAILWAY COMPANY TO WHICH THAT COMPANY WAS ENTITLED UNDER GENERAL AND SPECIAL LAWS OF THE STATE OF TEXAS PASSED PRIOR TO 1869. HENCE, THE CONSTITUTIONAL PROVISION IN QUESTION VIOLATES SECTION 10 OF ARTICLE I. OF THE CONSTITUTION OF THE UNITED STATES, AND SECTION 1 OF THE FOURTEENTH AMENDMENT THEREOF.

The usual order of argument in a case of this kind is to establish first the existence of the Federal question, and to then show that it was erroneously decided by the State Court, and that there are no other questions in the case, independent of the Federal question, which will justify and sustain the judgment complained of. But the nature of this branch of the case is such that the existence of the Federal question, the erroneous decision thereof by the State Court, and the controlling in-

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fluence of that error upon the whole case, can be more conveniently presented and discussed together. The argument which establishes the existence of the Federal question must necessarily show at the same time that it was wrongly decided, and that a correct decision would amount to a reversal of the judgment before the Court for review. We shall discuss this branch of the case under the following headings: (1) The Buffalo Bayou, Brazos and Colorado Railway Company had a right, under its charter and the amendments thereto and the general laws passed prior to 1869, to a land grant of sixteen sections for each mile of road constructed. It was subject, however, to a certain restriction as to route. (2) That right, together with all the other franchises, privileges, etc., of that company, passed, through the purchasers thereof at a foreclosure sale, to the Galveston, Harrisburg and San Antonio Railway Company. (3) When the restriction as to route was removed and a new route or extension was authorized by the special Act of July 27, 1870, it was not necessary for that act to regrant the land grant or to recreate the other corporate rights and franchises in order that they might be exercised upon or in respect to the changed route or exten-

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sion. They accompanied and became attached to the changed route or extension as already existing rights, creatures of the laws which first called them into being and unaffected by the limitations upon the powers of the Legislature which changed the line of the railroad. (4) The right to a land grant was a contract right and a vested right, protected by the Federal Constitution from impairment or abridgment or divestiture by any subsequent law of the State, constitutional or statutory. (5) Section 6 of Article 10 of the Constitution of 1869, having been construed by the State Court as defeating the right which the plaintiff in error would otherwise have to a land grant in respect of the changed route or extension, abridges and impairs charter rights and privileges in the nature of contract and vested rights, within the prohibition of the Federal Constitution.

(1) *The Buffalo Bayou, Brazos and Colorado Railway Company had a right under its charter and the amendments thereto, passed prior to* 1869, *to a land grant of sixteen sections for each mile of road constructed. It was subject, however, to a certain restriction as to route.*

The correctness of this proposition will hardly be questioned. It was conceded by the State

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Supreme Court in its answers to the certified questions for the Court of Civil Appeals. The first special Act of February 4, 1854, unequivocally granted to the company all the rights, privileges and benefits accruing from any general law or laws that had been or might thereafter be passed by the State to encourage the construction of railroads. The general Act of January 30, 1854, was such a law and conferred the right to sixteen sections of land for each mile of constructed road. The State Court also conceded that the legislation of 1862 and the Act of November 13, 1866, had the effect of extending the lifetime of the Act of January 30, 1854, for ten years from November 13, 1866. This was not a very liberal concession, for the efficacy of those laws in keeping in force the general land grant act had been expressly recognized and declared by this Court in the case of *Davis vs. Gray*, 16 Wall., 203, and by the State Supreme Court in the case of *Railroad Co. vs. Knechler*, 26 Tex., 382. It is true that an independent act, the second special Act of February 4, 1854, imposed a restriction as to the route of the extension of the company's railroad which, until removed by competent legislative authority, curtailed the en-

joyment of the right or franchise of a land grant. But when once this restriction was removed the right to a land grant needed no additional legislation to give it force and effect in respect to any railroad which the corporation was authorized to construct under its charter or any future amendment thereof.

(2) *The right to a land grant, together with all the other corporate franchises, privileges, etc., of the Buffalo Bayou, Brazos and Colorado Railway Company, passed, through the purchasers at a foreclosure sale, to the Galveston, Harrisburg and San Antonio Railway Company.*

There is no doubt about the correctness of this proposition. The preamble to the special Act of July 27, 1870, quoted above in the statement of this case, recites the sale under foreclosure, on July 11, 1868, of the roadbed, track, franchise and charter rights and privileges of the old company; the right of the purchasers under the law of December 19, 1857, to have and exercise all the powers, privileges and franchises granted to the sold-out company by its charter or by virtue of the general laws of the State, and to be deemed and taken to be the true owners of said charter,

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and corporators under the same, and vested with all powers, rights, privileges and benefits thereof; the formation by the purchasers of a new company under the old name; the expenditure by them of large sums of money in the reconstruction of the railroad and in the acquisition of other property, and their desire to be distinguished by name from the "sold out" company; to consolidate its property and to extend the said line of railroad. Section 5 of the Act of December 19, 1857 (Art. 4260 of the Revised Statutes of 1879), referred to in the preamble, reads as follows:

"SECTION 5. The roadbed, track, franchise "and chartered rights and privileges of any "railroad company in this State shall be sub- "ject to the payment of the debts and legal "liabilities of said company, and may be sold "in satisfaction of the same; but the said "roadbed, track, franchise and chartered "powers and privileges shall be deemed an "entire thing, and must be sold as such; and "in case of the sale of the same, whether by "virtue of an execution, order of sale, deed "of trust, or any other power, the purchaser "or purchasers at such sale, and their asso- "ciates, shall be entitled to have and exercise "all the powers, privileges and franchises "granted to said company by its charter, or

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" by virtue of the general laws of this State;
" and the said purchaser or purchasers and
" their associates shall be deemed and taken
" to be the true owners of said charter, and
" corporators under the same, and vested
" with all the powers, rights, privileges and
" benefits thereof, in the same manner and to
" the same extent as if they were the orig-
" inal corporators of said company; and shall
" have power to construct, complete, equip
" and work the road upon the same terms
" and under the same conditions and restric-
" tions as are imposed by their charter and
" the general laws of this State" (General Laws, 1857, p. 26).

The Galveston, Harrisburg and San Antonio Railway Company is but the Buffalo Bayou, Brazos and Colorado Railway Company under another name, with the additional rights and burdens granted by the Act of July 27, 1870. There was no break in the continuity of corporate existence; the *corporation* itself passed to the purchasers at the sale. No further legislation was necessary to authorize the purchasers to exercise all the functions and enjoy all the rights and privileges of the sold-out company (H. & T. C. R. Co. vs. Shirley, 54 Tex., 125, 138). If a new corporation were to be brought into existence, legislation would have been necessary, for corporations

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could then be created in the State of Texas in no other way. But an examination of the provisions of the Act of July 27, 1870, makes it manifest that the Legislature was not creating a new corporation and conferring upon it the corporate powers it was to exercise. The act did not confer even the rights and franchises essential to the existence of a corporation and to owning and operating a railroad; it simply supplemented an existing charter. As was said by the Court in G. C. & S. F. R. Co. vs. Newell, 73 Tex., 335, 338, referring to Section 5 of the Act of December 19, 1857:

> "By the sale made by the Sheriff there "was a change made in the ownership of the "Central and Montgomery Railroad, and of "its franchises, but the corporate existence "continues with franchises neither enlarged "nor restricted, as before. A railway com- "pany, in whomsoever may be its ownership, "stands charged with every duty and obliga- "tion to the public imposed upon it by its "charter and the nature of its business, and "from those it cannot escape without legisla- "tive permission so long as its corporate ex- "istence continues."

It is perfectly clear, therefore, that plaintiff in error is in effect the same corporation as once existed under the name of the Buffalo Bayou, Brazos

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and Colorado Railway Company, subject to the changes that may have been wrought by subsequent legislation; and that as such it is entitled to the rights of that company under its charter and the acts relating to it, and under the general laws of the State, to the same extent as if there had never been any sale of the rights and franchises of that company, or any changes in its ownership. No new corporation was created by the special Act of July 27, 1870. That act merely changed the name of plaintiff in error, removed the restriction respecting its route via Austin, imposed by the special Act of February 4th, 1854; and made other regulations in reference to the corporation which need not be further considered here. It remained the same corporation, with all the rights conferred by its original charter and amendments of the same; and there was no attempt by said act to deprive it of the land grant to which it was entitled under the Act of January 30th, 1854. It was one of the railroad companies for whose benefit that law was passed. That grant was a right or franchise conferred upon it. Other corporations thereafter created might construct more roads from the Gulf Coast in a westerly direction, and accomplish, even more perfectly, the objects

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sought by the passage of that act, and yet would not be entitled to any of the lands thereby granted, because not contemplated by or coming within the act. It was a right or franchise peculiar to plaintiff in error and other companies theretofore chartered for the construction of roads westward from Buffalo Bayou or the Gulf Coast. This right to sixteen sections of land for each mile of road constructed by it, existing by reason of the fact that it had been chartered prior to January 30th, 1854, was as much a franchise of the Buffalo Bayou, Brazos and Colorado Railway Company, which passed to the purchasers at the sale in question, as was the right to construct and operate its railroad. It was a right which the Legislature had the power to renew and extend beyond the time originally fixed for its expiration. It was a right which the Legislature could confer, as it did by special acts in many instances, upon other corporations not coming within its terms originally, and under such restrictions as the Legislature saw proper to impose.

We understand the State Supreme Court, in its opinion, to assume that plaintiff in error has all the rights and powers conferred by charter or other law on the Buffalo Bayou, Brazos and Colo-

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rado Railway Company, and that the corporations are identical; but we emphasize it here because it is a consideration which should be fully appreciated in passing upon other questions involved in this case.

(3) *When the restriction as to route was removed and a new route or extension was authorized by the special Act of July* 27, 1870, *it was not necessary for that act to regrant the land grant or to recreate the other corporate rights and franchises, in order that they might be exercised upon or in respect to the changed route or extension. They accompanied and became attached to the changed route or extension as already existing rights, creatures of the laws which first called them into being, and unaffected by the limitations upon the powers of the Legislature which changed the line of the railroad.*

The right to a land grant, such as is claimed for plaintiff in error, belongs to the generic class of corporate franchises. In the case of *Davis vs. Gray*, 16 Wall., 203, a similar right was considered and treated as one of the franchises of a railroad corporation (see, also, *Railroad Co. vs. Georgia*, 98 U. S., 365). And in the case of *The State vs. Minn Central R. R. Co.*, 36 Minn., p.

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259, the Court, in speaking of a right to a land grant, said: "The right to acquire and dispose of "these lands and the right to hold the same in the "meantime exempt from taxation are corporate "*franchises*, but auxiliary and subordinate to the "main purpose and object for which the com- "panies were chartered."

Our contention is that, while the Act of July 27, 1870, had an indirect effect upon the then existing right to a land grant, inasmuch as it repealed the supplemental Act of February 4, 1854, restricting the route to Austin and authorized the extension of the road from Columbus to San Antonio and thence westward, it did not thereby create the land grant under which plaintiff in error received the land certificates in controversy, issued to it for the construction of a portion of its road between the points above named. That grant already existed and was one of the corporate franchises which the purchasers of the Buffalo Bayou, Brazos and Colorado Railway Company acquired, and which they transmitted to the reorganized company. It was one of the attributes of the corporation, a part of its corporate powers and privileges, which attached to and was exercisable upon every mile of road it might construct under com-

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petent legislative authority. It needed no additional legislation to give it life and being. The only restriction upon its exercise was of a kind which might be removed by future legislation, and, when removed, no further grant was necessary to give it full force and effect. While the State Supreme Court, in its opinion upon the certified questions, practically conceded that legislative authority to a company to change its line carried with it, without additional grant, the privilege of earning lands for the construction of the new line, yet the theory upon which its decision rests was that, as the right to build from Columbus to San Antonio was conferred by the Act of July 27, 1870, so the right to receive a donation of land for that portion of the road, if it existed, must be derived from the same act; that, as it was beyond the power of the Legislature in 1870 to confer upon any railroad company a right to a donation of land from the State, the plaintiff in error's supposed right to receive the certificates attached was without legal existence. In this way the Court gave effect to the prohibition against land grants in the Constitution of 1869, construing it so as to make it

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destructive of one of the most valuable charter rights and privileges of the plaintiff in error.

Our reply to this position of the State Court is that the Act of July 27, 1870, simply authorized an extension of the road towards San Antonio, thereby changing the route and repealing the prior law which had restricted it to another direction, and against such legislation there is no constitutional prohibition. Plaintiff in error's right to receive a donation of land for the construction of this part of its road owes its existence to legislation prior to the Act of 1870 and the Constitution of 1869. By merely authorizing an existing corporation to extend its road or build a branch line, the Legislature cannot be said to thereby create anew all the corporate rights and franchises which the corporation, under its charter, may enjoy or exercise upon or in respect to the extension or branch. The original grant of the corporate rights and franchises necessarily involved the right to enjoy them in respect to any physical property which the company might acquire under existing or future legislation. Legislation creating a land grant right is one thing, and legislation dealing with an existing land grant right and affecting merely the location of the physical property with

respect to which the right is to be exercised, is another and quite a different thing.

The State Court fails to distinguish between the railway company, with its corporate rights and franchises, and its physical railway. Yet there is a fundamental distinction between the two which has been frequently recognized. The text-books on taxation make us familiar with the difference between the corporate rights and franchises, and the physical tangible property upon or in respect to which they are exercised. The distinction is seen again in cases construing the effect of the constitutional prohibition against special legislation creating railroad corporations or conferring corporate rights and franchises, upon an act of the Legislature authorizing a certain railroad to change its route, or acquire the road of another company, or, what is the same in principle, to extend its own road in a direction not originally authorized. The cases sustaining such legislation are absolutely opposed to the proposition advanced on behalf of the State, that where a Legislature authorizes an existing corporation to extend its road, no right or franchise can be exercised or enjoyed in respect to the extension which it was not in the power of

the Legislature to confer at the time it authorized the extension.

The Constitution of Alabama declared that corporations should not be created by special act. The Legislature passed a special act authorizing an existing railroad corporation to change its name and to purchase the property of another company, and, necessarily, to exercise and enjoy, in respect to the authorized addition to its property, the corporate rights and franchises which had been conferred by a prior act of the Legislature, and which, at the time of the act in question, it would have been unconstitutional for the Legislature to create by special act. The Supreme Court of the United States said:

> "We are unable to see anything in this "legislation repugnant to the constitutional "provision referred to. That provision can- "not, surely, be construed to prohibit the "Legislature from changing the name of a "corporation, or from giving it power to "purchase additional property, and this was "all that it did in this case. No new corpo- "rate powers or franchises were created"
> Wallis vs. Loomis, 97 U. S., 146, 154.

So, in Southern Pacific Co. vs. Orton, 6 Sawyer (C. C.), 157, the Court considered the effect of a

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similar provision in the Constitution of California, upon a special act giving authority to the Southern Pacific Railroad Company to change the line of its road. The special act was held to be valid on the ground that it was not an act creating a corporation, in whole or in part, and did not involve the creation of any new corporate powers.

The distinction we are discussing was forcibly pointed out in the case of Cheraw and Salisbury R. R. Co. vs. Commissioners of Anson, 88 N. C., 519 (17 Am. & Eng. R. R. Cas., p. 434), where it was claimed that an exemption from taxation granted in the original charter of a railroad did not extend to a change of route authorized by a subsequent law. The Court said:

> "But the defendant contends that the "changes produced by subsequent legisla- "tion are so fundamental as to have de- "stroyed the identity of the corporation, as "first formed, and substituted a new corpo- "rate organization in its place, to which the "exemption has not been transferred.
>
> "In order to a satisfactory solution of the "question thus presented, we have examined "the series of acts of the General Assembly "relating to the company, and recited the "substantial provisions contained in each, "and, in our opinion, the defense finds no "support in any of them.

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"The fallacy of the argument for the "alleged organic change consists, as was "properly urged in the argument for the "plaintiff, in the failure to distinguish be- "tween the railroad, the constructed work of "the company, and the company itself. "Variations in the route over which the "company may run do not affect the identity "of the corporate body that builds it.

"Every one of the successive acts, after "the grant of the charter, professes in its "title to be amendatory only, and in its pro- "visions is in fact amendatory of the orig- "inal. The modifications, in some particu- "lars, are but recognitions of the undisturbed "stability of the others. None of them touch "the vital parts or impair the integrity of "the organic body as it existed at its forma- "tion. It is the same company executing its "undertaken purpose to push forward its "track into the interior portion of the State, "deflecting from the line first projected only "with the permission of the power that gave "it being and conferred its rights, and stop- "ping short of its distant terminus for want "of means to continue the work. * * *

"There are abundant precedents, if any "are now needed, to sustain this view. The "name and termini of the railroad, author- "ized in the charter granted to the Wilming- "ton and Raleigh Railroad Company, were "subsequently changed and a part of the "line lopped off; and yet, when the exemp-

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" tion contained in the charter was claimed
" and allowed, it was not suggested that
" amendments had abridged the rights of the
" Company in this regard (Wilmington &
" Weldon Railroad Company vs. Reid, 13
" Wall., 264).

" The very point has been determined at
" the last term in a case much stronger
" in the alterations of the charter, and, indeed,
" where a new company was formed, and yet
" was held to possess unimpaired the same
" right to a limited exemption from public
" taxes (Railroad Co. vs. Courts of Meck-
" lenburg, 87 N. C., 129)."

The right to receive State aid in land is a corporate franchise much less strictly construed than the corporate franchise of exemption from taxation. If, as we have seen, the corporate franchise of exemption from taxation extends to an extension or change of route authorized by Legislation, subsequent to that creating the exemption from taxation, and needed not to be renewed by the legislature when it authorized the extension or change of route, why may not the corporate franchise of a land grant in like manner extend to a change of route or extension without necessity of being granted anew in respect to the extended road? The corporate franchises and powers of a

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railroad company, chartered by special act of the Legislature, are of the same nature as the land-grant franchise we are now considering. If, as we have seen, the corporate rights and franchises created by a special act of the Legislature extend to and may be exercised in respect to an extension or branch authorized by legislation, passed at a time when there is a constitutional inhibition against the creation by special act of a corporation or of corporate rights and franchises, why may not the corporate franchise of State aid in land be exercised and enjoyed in respect to an extension, although authorized at a time when the Constitution prohibited the passage of laws granting land to any person or persons ?

In Southern Pacific Co. vs. Orton, *supra*, Judge SAWYER said that a legislative authority given to a railroad company to change its line does not involve the creation of any new corporate powers. The Supreme Court of North Carolina says (Cheraw & Co. vs. Commissioners, *supra*) that " variations in the route over which the com-" pany may run do not affect the identity of the " corporate body that builds it." The Supreme Court of the United States said in Wallace vs. Loomis, quoted above, speaking of the extension

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of an existing railroad which the Legislature had authorized by permitting the purchase of another railroad, that thereby "no new corporate powers "or franchises were created."

Do not all these authorities declare that, when the Legislature authorizes a pre-existing railroad company to build an extension, all that company's corporate rights and franchises are extended to, and operate upon, the extension to the same extent as if it were part of the original road, and this, not by force of the Legislature authorizing the extension, but by reason of the pre-existence of those corporate rights and franchises, by force of the original grant which created them. Hence, their existence and enjoyment in reference to the extension is not affected by limitations upon the power of the Legislature at the time the extension or change of route was authorized.

Section 12 of the special Act of July 27, 1870, contains the proviso "that nothing in this act con-"tained shall be construed as reviving or renew-"ing any land grant to said company for road "hereafter to be completed which it does not "possess by existing law." There is nothing in this proviso inconsistent with our contention that the right of plaintiff in error to receive the lands

in controversy antedated the Act of 1870, and was not intended to be created or destroyed by the provisions of that act. The words "reviving "or renewing any land grant" are applicable only to a case where a land grant has been lost by forfeiture or lapse of time or in some other way, and it is not pretended that the land grant claimed by plaintiff in error stands in need of any revivor or renewal. In the light of the history of the the times, which may be seen in the decision in the case of *Railroad Compy. vs. Kuechler*, 36 Tex., 382, and *Davis vs. Gray*, 16 Wall., 203, the meaning of Section 12 becomes clear.

The Act of 1870 was passed a short time after the Constitution of 1869 was ratified by Congress. The then Attorney-General of the State, and, probably, the Governor, had construed Section 6 of Article 10 of the Constitution as repealing or revoking all land grants to railroads, and maintained, moreover, that such land grants had lapsed and were invalid for various other reasons set out in the Kuechler case (36 Tex., p. 386). The Governor and Commissioner of the Land Office, acting on this opinion, were refusing to issue certificates to any railroad. The Houston and Great Northern Railroad Company had then instituted suit, or was

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about to do so, in the District Court, against Land Commissioner Kuechler to compel him to issue certificates. This condition of things cast a doubt over the right of all railroads to lands under their charters, which was not removed until the decision of the Kuechler case the next year. Construed in the light of this contemporary history, all the Legislature meant by the proviso in Section 12 was that, if the opinion of the Attorney-General should be sustained by the Courts, then nothing in the Act of 1870 should be considered as reviving or renewing the railway company's claim to a land grant. Any other construction would make Section 12 inconsistent with Section 11 and the whole tenor of the act.

(4) *The right of plaintiff in error to a land grant was a contract right and a vested right, protected by the Federal Constitution from impairment or abridgment by any subsequent law of the State, statutory or constitutional.*

The Buffalo Bayou, Brazos and Colorado Railway Company, having accepted the grants made by the special and general legislation above referred to and having manifested its acceptance by the construction of an important part of its line of railroad, the legislation ripened into a contract

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between the company and the State prior to the adoption of the Constitution of 1869. These contract rights of the company passed unimpaired to the purchasers at the foreclosure sale, who also, as stated in the preamble to the Act of July 27, 1870, expended their means in prosecution of the enterprise which the land grant was intended to encourage. Their rights passed to the plaintiff in error, which was organized and the necessary capital therefor obtained, presumably, on the faith of the promised aid of a land grant held out by the State as an inducement to the investment of capital in such enterprises. It ought not to be questioned that a right to a land grant acquired in this way could not be destroyed or abridged by the Constitution of 1869 without violating the contract clause of the Constitution of the United States and Section 1 of the Fourteenth Amendment.

The State on this branch of the case was driven to contend in the State Court that no vested or contract rights are created by a grant of the right to receive land for the construction of its road contained in the legislative charter of a railroad company. The contrary of this contention was decided by the Supreme Court of Texas and by

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this Court in the cases above cited of *Railroad Company vs. Kuechler* and of *Davis vs. Gray*. In the former case the Court said:

> "The Act of 1854 contained a pledge of "the public faith to railroad companies then "possessing charters, that they should receive "certain benefits for the constructing of the "railways contemplated by their charters.
>
> "Companies had gone to work in the just "expectation that they would reap those "benefits. This law and the law supple- "mentary to it had all the sanctity of a con- "tract between the State and those com- "panies" (p. 393; italics ours).

In the latter case the Court said:

> "That the act of incorporation and the "land grant here in question were contracts "is too well settled in this Court to require "discussion. As such they were within the "protection of that clause of the Constitution "of the United States which declares that no "State shall pass any law impairing the obli- "gation of contracts. The ordinance of 1869, "and the Constitution adopted in that year, "in so far as they concern the question under "consideration, are nullities, and may be laid "out of view. When a State becomes a "party to a contract, as in the case before us, "the same rules of law are applied to her as "to private persons under like circumstances" (p. 232).

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It is insisted, however, that a general land-grant act is a mere bounty law, repealable at the pleasure of the State, without regard to the rights of those who had accepted and acted upon the promise it contained. In support of this contention the case of *Salt Co. vs. East Saginaw*, 13 Wall., 373, is relied upon. That case does not support the State's contention, and is, moreover, inapplicable to a general land-grant act passed to encourage and aid the construction of public highways like railroads. It simply declared that a State may repeal a bounty law, and that no one has such a vested right in the benefits promised as to entitle him to demand the indefinite continuance of the law. But it was not decided that a State can, by the repeal of even a bounty law, impair or destroy rights which had accrued before the repeal.

But a general land-grant act to promote the construction of railroads, like the Acts of 1854 or 1876, is not a mere bounty law. It discharges a duty which the State owes to its inhabitants; it imposes onerous obligations on the grantee; it secures valuable benefits to the grantor. The State is under no obligation to furnish its inhabitants with salt, or to aid them in the manufacture

of it, but the duty does rest upon it to provide public highways. This duty is ordinarily performed through railroad corporations, which are regarded and treated as quasi-public agencies. It has long been the policy, not only of the State of Texas, but of the other States and of the United States, to encourage, by State aid in land or bonds or otherwise, the construction of railroads when the undeveloped and sparsely-settled condition of the country does not offer sufficient inducement for the investment of capital in such enterprises. For such grants the building of the road is the contemplated and sufficient consideration (101 U. S., 71, 83).

The same Court which rendered the decision in Salt Company vs. East Saginaw has declared that legislation similar to the Acts of 1854 and of 1876 does not fall under the category of bounty laws. We refer to the cause of United States vs. Denver and Rio Grande Ry. Co., 150 U. S., 1, 8, 14.

> Page 8: "It was not a mere bounty for "the benefit of the railroads that might accept "its provisions, but was legislation intended "to promote the interests of the Government "in opening to settlement and enhancing the "value of those public lands through or near "which such railroads might be constructed.

"To induce the investment of capital in the "construction of railroads through the public "domain, Congress had previously granted "special rights," etc.

And at page 14 the Court again says:

"It is undoubtedly, as urged by the "plaintiffs in error, the well-settled rule of "this Court that public grants are construed "strictly against the grantees; but they are "not to be so construed as to defeat the "intent of the Legislature, or to withhold "what is given either expressly or by neces- "sary or fair implications. In Winona and "St. Peter Railroad vs. Barney, 113 U. S., "618, 625, Mr. Justice Field, speaking for "the Court, thus states the rule upon this "subject: 'The acts making the grants "'* * * are to receive such a construction "'as will carry out the intent of Congress, "'however difficult it might be to give full "'effect to the language used if the grants "'were by instruments of private conveyance. "'To ascertain that intent we must look to the "'condition of the country when the acts were "'passed, as well as to the purpose declared "'on their face, and read all parts of them "'together.'

"Looking to the condition of the country, "and the purpose intended to be accom- "plished by the act, this language of the "Court furnishes the proper rule of con- "struction of the Act of 1875. When an act,

" operating as a general law, and manifesting
" clearly the intention of Congress to secure
" public advantages, or to subserve the pub-
" lic interests and welfare by means of bene-
" fits more or less valuable, offers to indi-
" viduals or to corporations as an inducement
" to undertake and accomplish great and ex-
" pensive enterprises or works of a quasi-
" public character in or through an immense
" and undeveloped public domain, such legis-
" lation stands upon a somewhat different
" footing from merely a private grant, and
" should receive at the hands of the Court a
" more liberal construction in favor of the
" purposes for which it was enacted (Bradley
" vs. New York and New Haven Railroad,
" 21 Connecticut, 294; Pierce on Rail-
" roads, 491)."

It will not do to say that the offer of land may be withdrawn at any time before the actual construction of the railroad. To maintain this contention the protection of the Federal Constitution must be limited to *executed* contracts. But the constitutional prohibition against the impairment of contracts by a State applies to all contracts, to those *executory* as well as to those *executed*.

" An executory contract is one in which a
" party binds himself to do, or not to do, a
" particular thing. * * * A contract ex-
" ecuted, as well as one which is executory,

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> " contains obligations binding on the parties. " * * * They [the words of the prohibi- " tion in the Federal Constitution] are gen- " eral, and are applicable to contracts of " every description " (Fletcher vs. Peck, 6 Cranch, pp. 136, 137).

The Court then proceeds to show that the prohibition applies to contracts of the State as fully as to contracts of individuals. An executory contract has been defined above. It is also defined in Bishop on Contracts (Ed. of 1887, § 624) as follows:

> " A contract is executory when the thing " agreed has not been done. It is executed " when the thing has been done. After one " party has performed while the other has " not, it is said to be executed on one side " and executory on the other."

The contract and the performance of it are entirely different things. The obligation of the contract arises when the contract is made. An executory contract may be complete and impose binding obligations before the performance of the thing agreed has been accomplished. So, in Hall vs. Wisconsin, 103 U. S., 5, the Court declared unconstitutional a law repealing a prior law authorizing and contracting for the performance of a cer-

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tain public work, although the repealing law was passed before the completion of the work. Contracts usually arise from an offer by one party and an acceptance by the other. The acceptance need not be express; it may be by some overt act. "The doing of a thing pursuant to an offer may "be both an acceptance and performance" (Bishop on Contracts [Ed. 1887], § 329.) An offer may be to all persons or to all of a particular class, and may be accepted and a contract created by being acted on. "If one makes an offer to another, or "to all persons in general, and does not withdraw "it, while the other person in the former case, or "any one in the latter, goes forward and does the "thing, such performance carries with it an ac- "ceptance of the offer; and the person who made "it must pay or do what he proposed" (*Id.*, § 330).

(5) *Section* 6 *of Article* 10 *of the Constitution of* 1869, *having been construed by the State Court as defeating the right which plaintiff in error would otherwise have to a land grant in respect of the changed route or extension, abridges and impairs charter rights and privileges, in the nature of contract and vested rights, within the prohibition of the Federal Constitution.*

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The State Court certainly held that the right of plaintiff in error to the land grant in controversy was defeated by the prohibition in the Constitution of 1869. It was not pretended that the land-grant rights of the old company, or of its purchasers, or of the reorganized company, were ever surrendered or forfeited. The special Act of July 27, 1870, did not take away those rights; it contains no language suggestive of any such purpose. We have shown that the mere change of route could not destroy the right to earn lands by the construction of a road along the substituted route, *and the State Court practically concedes this.* According to the decision of the State Court, Section 6 of Article 10 of the State Constitution alone blocks the way to a perfect title to the lands in question.

If that provision in the Constitution of the State had that effect, then we submit that it violated Section 10, Article 1, of the Federal Constitution, and Section 1 of the Fourteenth Amendment. The protection afforded by the provisions of the Constitution of the United States referred to is not partial; it is complete. A State statute or Constitution which takes a part, however small, of the contract or vested right, is as obnoxious as

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if it sought to take the whole. If the Constitution of 1869 deprived plaintiff in error of the land grant to which it is conceded it would be otherwise entitled for the road constructed on the changed route, it is invalid, and as much in violation of the Federal Constitution as if it had withdrawn the land grant for the original route, or had attempted to retake that which had been granted for the road already constructed. The right to the land grant already existed. It was in force when the Constitution of 1869 was adopted. It was not dependent upon the Act of July 27th, 1870, but antedated that act. There is absolutely nothing in that act to indicate that the Legislature intended to require plaintiff in error to surrender the land grant to which it was entitled as a condition or consideration for the authority to change the route of its road, or to forfeit the important rights it had acquired by the purchase of the old company. Even if any consideration for the act were necessary (and, of course, it was not) it was abundantly secured by the advantages accruing to the State from the construction of the road along the new route, and from the assumption by plaintiff in error of the large indebtedness of the sold-out company to the State

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on account of the school-fund loan. That the Act of July 27th, 1870, was valid when passed, no one disputes, and that the right to the land grant followed the change of route as a matter of course, and without the necessity of any express provision to that effect, is clear, and is indeed conceded by this Court, but for the Constitution of 1869. If it had been necessary to make a new grant, or that the act should provide that the land grant should follow the change of route in order to give it that effect, then it might be contended that the Legislature was deprived by the Constitution of the power to make such grant. Plaintiff in error need not rely upon that act for the land grant. If, therefore, the Constitution had any effect upon the act at all, it was not a *prohibition* of the grant, for that already existed, but the effect, if any, was to *withdraw* the existing grant, and such effect was prohibited by the Federal Constitution. In other words, the change of route authorized by that act did not forfeit the land grant to which plaintiff in error was already entitled, and if it was forfeited, or if plaintiff in error was deprived of it, as the State contends, such result was accomplished only by the Constitution then in force, in which respect

the Constitution was clearly contrary to the Constitution of the United States.

But, aside from this, was the route of the road of plaintiff in error materially changed by the Act of July 27, 1870? This is a question which we have a right to present to this Court, since the change of route is urged as an answer to the constitutional objections we have made against the effect given to the prohibition in the Constitution of 1869. We have seen that there was no cessation or break in the life of the corporation; that it was the same corporation; that none of its rights to lands, admitted to exist, were withdrawn or surrendered. The great scheme and object of the charter remained unchanged. The chief purpose of the general law of January 30, 1854, granting lands to railroad companies, was to promote the construction of trunk lines of railway from the Gulf Coast, or tide waters of Buffalo Bayou, or across the State, toward the Pacific Ocean. The construction of main trunk lines was contemplated, and the benefits of the act were not extended to branch lines. Plaintiff in error's charter, then existing, called for the construction of a road from Buffalo Bayou westwardly, and part of it was then in operation. The special Act of February 4th,

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1854, requiring plaintiff in error's line to be constructed via Austin, and on which reliance is entirely placed for the forfeiture of its rights in this case, contemplated the extension of the road "from "Austin to connect with any road running north "of Austin to the Pacific Ocean," the connection to be made between the 96th and 98th parallels of longitude. We conceive this provision to be very significant. Several lines were then projected, and others were contemplated from the eastern and northeastern boundary of the State, westward to the Pacific Ocean. The evident object and purpose of the Legislature, in requiring the line of plaintiff in error to be constructed via Austin, was with a view to a connection with these lines, forming a through route from tide water and the southeastern portion of the State to the Pacific Ocean. A great transcontinental line was then the object and policy of the Legislature. It was designed by the amendments to its charter to have this road constitute, with its northwestern connections, such a route. The Pacific Ocean was, by that act, made its objective point. The people of Texas, through their Legislature, never relaxed their efforts to secure a line of railway from the

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Gulf to the Pacific Ocean, except during the short period when Section 6, Article X., of the Constitution of 1869, was in force, until they succeeded. It was as much or more an object of public desire on July 27th, 1870, as on January 30th or February 4th, 1854. It was in furtherance of this object and purpose that the route of plaintiff in error's road was changed by the special Act of July 27th, 1870. Instead of reaching the Pacific Ocean, or connecting with lines reaching there via Austin, plaintiff in error was authorized to vary its line to the same destination by constructing via San Antonio. The object was the same in both instances—a transcontinental railway. The object was accomplished, and the road was pushed through via San Antonio to a connection with the Pacific Ocean, and now constitutes one of the most—if not the most—important transcontinental line of railway in America. There was, we submit, no change in the main route of such line. The Pacific Ocean and a transcontinental line of railway was the great object, and variation with respect to intermediate points could not have been a matter of much concern or importance. Can it be doubted that the Legislature was willing to give as readily, and intended to give, land for a line o

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railway from tide water to the great West via San Antonio as via Austin? Can it be supposed that the Legislature of the whole State, desiring to promote the construction of a line of railway, for instance, between Houston and Austin, would not give as readily and as freely for a line via Elgin as via Bastrop? Austin and Houston would be the objective points. Variation at intermediate points would, obviously, be unimportant in such a scheme.

We submit, therefore, that, the object being to secure a line of railway from the Gulf Coast to the Pacific Ocean, the variation of the route from Austin to San Antonio was not a material departure from the purpose of the grant, but, on the contrary, such object and purpose were really accomplished by the change. It was not in any sense a new line, but merely a wise and expedient variation in the original line, designed to better accomplish the objects in view. It ought not, therefore, to be held or considered as in anywise impairing the rights existing under the original grant.

Before leaving this branch of the case, which concerns itself with the rights of plaintiff in error under its legislative charter and the amendments

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thereto, including the Act of July 27, 1870, we desire to call attention to Section 11 of the Act of 1870, and also to refer briefly to the prompt repeal of the prohibition in the Constitution of 1869 against the making of land grants to railroads. These matters throw some light upon the meaning and purpose of Section 6 of Article 10 of the Constitution of 1869 and upon the nature of the special Act of July 27, 1870.

Section 11 of the special Act of 1870 reads as follows :

> " That said new company shall be entitled
> " to the same or similar rights and relief, ex-
> " cept State aid in bonds, or endorsement of,
> " or guaranty of interest on bonds, granted to
> " or provided for any other railroad by the
> " Legislature, and upon the same or similar
> " terms and conditions, so far as such rights or
> " relief are, in their character, applicable to
> " said new company or its line or lines of
> " railroad."

It appears from the conclusions of fact found by the Court of Civil Appeals that construction of the road of plaintiff in error for which the certificates in question were issued began at Columbus westwardly in March, 1873, and was completed to the West Navidad about June 1st, 1874 ; and

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that, in the meantime, the prohibition against granting lands in aid of railroads having been withdrawn by the adoption of an amendment to the Constitution of 1869, the Legislature granted sixteen sections of land to a number of railroads, named in the findings of fact, for each mile of road they should construct.

Plaintiff in error set up and claimed in its answer filed in the court below, and it is a part of its case now, that by reason of the amendment to Section 6 of Article 10 of the Constitution of 1869, and the passage of acts granting lands to numerous railroads, it was entitled, under Section 11 of the special Act of 1870, to receive the land certificates in controversy, if it was not entitled to them under previous legislation. This point was not presented to the State Supreme Court by the certified questions and was not argued in that court. It has not been passed upon by either the Supreme Court or the Court of Civil Appeals. We believe that it affords a complete answer to the State's demand.

Section 11 of plaintiff in error's amended charter undoubtedly meant something, and it could not have any other effect than to grant to plaintiff in error the same aid in the way of lands that

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should be granted to other railroad companies. Evidently it was intended that, in the event the restriction imposed by the Constitution upon the power of the Legislature to grant land for such purposes should be thereafter removed, this company should be entitled to the same relief as was granted to other companies. No doubt it was incorporated in the act with a view to the removal of the constitutional restriction, which was thereafter accomplished by the amendment proposed in 1871 by the same Legislature. The Supreme Court of Texas has held that a law may be passed in contemplation of a change in the Constitution, and to become valid and effective in the event of such change (Railroad Co. vs. Cross, 47 Tex., 428, 436, citing Cooley's Const. Lim. 114, 117; Brig Aurora, 7 Cranch., 32; Peck vs. Weddell, 17 Ohio State, 271). It was known to the Legislature, of course, that the restrictions imposed by the Constitution of 1869 upon the power of the Legislature to grant lands in aid of the construction of railroads for the development of the State was at variance with the settled policy of the State, and with the will of the people, who were debarred from the right of voting upon the adoption of that Constitution. The

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same Legislature, within but a little over a year after it was adopted, proposed an amendment removing the restriction and returning to the policy which had become characteristic, and which resulted in so much benefit to the State. The amendment was adopted by the people at the first opportunity they had to express their opinion at the ballot box, for they were practically disfranchised when the Constitution was adopted.

The amendment was ratified by the Legislature, as we have seen, on March 9th, 1873. The undisputed evidence as well as the findings of the Court of Civil Appeals, as above stated, show the fact to be that the construction of the road in question (that is, west of Columbus) was not commenced until March, 1873. The exact date in March is not shown, but it cannot be material, since but little work could have been done and none of the road completed before the 19th day of that month, even if construction had commenced on the very first day of the month. It follows, therefore, that every foot of the road was constructed and completed after the restrictions imposed by the Constitution of 1869 had been removed and the State had returned to its former policy. Even if all the laws theretofore passed granting lands to rail-

road companies had been repealed by the Constitution of 1869, which of course we deny, the benefit of such as were thereafter passed inured to plaintiff in error under the provisions of Section 11 of the Act of July 27th, 1870. That a great many laws of that character were promptly passed by the Legislature upon ratification of the amendment to the Constitution we have already shown. The doubt which had been cast upon plaintiff in error's right to land for the construction of its road west of the Colorado by the Constitution of 1869, as that Constitution had been construed and attempted to be enforced by Governor Davis and his administration, as evidenced by their conduct, culminating in the litigation of Davis vs. Gray, and Railroad vs. Kuechler, had paralyzed the ability or discouraged the efforts of plaintiff in error to construct its road in accordance with the Act of July 27th, 1870. The amendment had been proposed in May, 1871, and adopted by the people in November, 1872, and it only needed the ratification of the Legislature, which was given in 1873, to make it effective. When that was secured the railway company immediately began the work of construction. Probably the financial aid necessary was withheld until that time, and was

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advanced only upon the faith of the amendment and in the belief that it removed any question about the right to the land grant. The same view was taken by the State authorities, and the certificates were issued accordingly by the Governor and Commissioner of the General Land Office without further question, as construction progressed; at the time, therefore, the road was constructed, and, when each of the certificates described in the State's petition was issued, all constitutional restriction, if any, had been removed, and all doubt cast by the Constitution of 1869 and by the conduct of Governor Davis' administration had ceased. These considerations, we submit, are controlling in the construction of the laws under which the right to the lands is claimed.

The line of road was one intended to be aided by the general Act of January, 1854. The benefit of the act, as well as all other acts granting land in aid of the construction of railroads, was expressly conferred upon plaintiff in error by the Act of February 4th, 1854. The benefit of these laws had been extended by the legislation of 1862 until two years after the war, and within that time the Legislature had extended the same for another

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period of ten years by the Act of November 13th, 1866. Plaintiff in error's right to the land grant was therefore in full force and existed beyond any sort of controversy when the Constitution of 1869 was adopted. We have already endeavored to show that that Constitution did not purport to, and could not have the effect of impairing or in any way interfering with the right thus clearly existing and enjoyed. But if it was so intended, its only just and reasonable effect, if any, in view of its early repeal, was to suspend temporarily the operation of those laws, which again resumed full force upon the adoption of the amendment when the State resumed progress which had been stayed by that Constitution. Looking to the settled policy of the State, continued without interruption from January, 1854, until the adoption of the Constitution of 1869, and to the prompt removal of that restriction by the adoption of the amendment by the people at the first opportunity they had to express their will, and the resumption and continuance for many years of the policy which had resulted in so much benefit to the State, and looking to the action of the State authorities in issuing the certificates and the prompt and diligent prosecution of the work after the adoption of the

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constitutional amendment, we submit that the laws under which the grants are claimed are entitled to a liberal construction in accordance with the intention and will of the people at the time they were enacted. No one will deny that at the time the road was constructed and the certificates in question were issued the people of the State, including all departments of the State Government, intended, with practical unanimity, that plaintiff in error should have, and considered that it was entitled to, the lands granted, and it is only since the road has been constructed, and all the benefits anticipated by the people and the State realized, that the claim has been made that the people and the State authorities did not mean to do, or had no right to do, what they did, and that plaintiff in error has no right to the lands which it in good faith earned, and which the State Government in good faith granted. It was then considered that the general law of 1854, and the law of 1866 extending the same, were in full force, and had not been impaired by the Constitution of 1869, or that the effect of that Constitution was merely to temporarily paralyze them, and that the laws and former policy of the State had come into full force again as soon as the

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restriction was removed by the adoption of the amendment to the Constitution by the people interested in the development and property of the State.

The Constitution of 1869 took effect on March 30, 1870. The amendment of Section 6, Article 10, was proposed by the Legislature by a resolution passed May 17, 1871 (Gen. Laws of 1871, p. 160). It was adopted by a vote of the people on the 5th, 6th, 7th and 8th days of November, 1872. It was ratified by the Legislature by a resolution passed on the 19th day of March, 1873 (Gen. Laws, pp. 224, 225), and became effective on that date. It thus appears that the first Legislature which met after the Constitution of 1869 went into effect—the Twelfth Legislature—adopted the resolution which was the first step in the repeal of the prohibition in Section 6 against land grants in aid of railroads. The amendment has been given in full in the statement of the case.

Particular attention is called to that part of the amendment or proviso which says: "*Nothing in "the foregoing proviso shall affect any rights "guaranteed or secured by laws passed prior to "the final adoption of this amendment.*" (Italics

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ours.) The importance of this amendment lies in the use of the form suitable for giving effect to the proviso as of date of the adoption of the Constitution of 1869. The amendment did not constitute any new grant of power, but operated as a removal, as of date of the Constitution of 1869, of any inhibition originally contained therein. This, of course, left all intermediate legislation in that direction effective and operative, and is a clear recognition of the fact that even the limit of the first proviso of the amendment is not applicable until a day which subsequently became fixed, and it clearly shows that all intermediate legislation between the adoption of the Constitution of 1869–70 and of the amendment of 1872 should, upon such adoption, become effectual and operative.

Besides, independently of the amendment to the Constitution removing the restriction imposed upon the Legislature to make new grants, the general law of 1854, granting lands in aid of the construction of railroads, was still in force as to existing rights, and was extended to November 13th, 1876, by the legislation of January 11th, 1862, and of November 13th, 1866. We have seen that the Constitution of 1869 did not assume to affect existing rights, but only to impose restrictions

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with respect to the future. The special Act of July 27th, 1870, providing for the change of route, evidently intended to grant to this company every benefit that any other company could acquire from any character of legislation. It seems evident from the terms of that act that the Legislature had in mind the probability of the change subsequently effected by the amendment of 1871–1873, and the Supreme Court of Texas has held in Railway Co. vs. Gross, *supra*, that the legislation passed in contemplation of a constitutional amendment subsequently adopted is valid.

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II.

We shall now take up and discuss that branch of the defense which asserts the rights of the plaintiff in error under the General Land Grant Act of August 16th, 1876, and the construction of its road between San Antonio and El Paso, a distance of 623 miles, on the faith of the State's aid in land offered in the Act of 1876, and complains of the repeal of that act by the Act of April 22, 1882, after the railway company had earned the right to receive the promised land grant by the construction of its road between the points named. In support of this part of the case we have assigned as error the action of the State Court in deciding that plaintiff in error had not, under the general Act of the Legislature of August 16th, 1876, by constructing and completing its road between San Antonio and El Paso, in consideration of the grant of sixteen sections of land made by said act for each mile of road so constructed, acquired a contract and vested right to, and was entitled to hold under the grant thus made, the lands involved in this suit, which contract and vested right could not be impaired or divested by the general Act of the Legislature of

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the State of Texas, approved April 22d, 1882, and in not deciding that the last-mentioned act, which attempted to repeal the act granting such lands to said railway company, was and is contrary to and in violation of the Constitution of the United States, and especially Article 1, Section 10, and Section 1 of Article XIV. of the amendments thereof, and could not, therefore, impair such company's contract right or divest it of said lands.

The Court will observe that this branch of the defense is presented in the alternative and need be considered only in the event that your Honors hold that plaintiff in error is not entitled to any land certificates by reason of the construction of the portion of its road between Columbus and the Guadalupe River.

In deciding as it did, that plaintiff in error had not acquired such titles to the lands it claimed to have earned by the construction of its road west of San Antonio as would entitle it to hold the lands in controversy, or to enforce its rights as an equitable defense to the State's demand, the State Court gave effect to the repealing Act of April 22, 1882, which plaintiff in error charged to be an absolute nullity because in contravention of the Constitution of the United States. The re-

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pealing act blocked the way to a perfect title, and the State Court declined to declare it to be unconstitutional or to recognize or give effect to the contract rights of the railway company which were impaired by that act.

The assignment of errors covering this branch of the case are those numbered Fourth to Eleventh inclusive (Printed Record 166, 169). They refer to the assignment of errors made before the Court of Civil Appeals, which present the errors complained of as follows:

"NINTH ASSIGNMENT OF ERROR.

"The Court erred in not rendering judg-
"ment in favor of defendant, because the
"evidence showed that defendant was en-
"titled to said land by virtue of the provis-
"ions of said Act of August 15, 1876, and
"defendant, relying in good faith upon the
"provisions of said act, constructed that por-
"tion of its road between San Antonio and
"El Paso, consisting of six hundred and
"twenty-three and fourteen-hundredths
"(623.14) miles, entitling it to receive from
"the State sixteen sections of land for each
"mile of said completed road, aggregating
"six million three hundred and eighty thou-
"sand nine hundred and fifty-three and six-
"tenths (6,380,953.6) acres—which the State
"of Texas declined to issue to it in land cer-

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" tificates entitling it to locate lands—which,
" upon an accounting between defendant
" and the State, after giving defendant credit
" for 879,078 1–20 acres, the land sued for,
" if erroneously granted, the State would
" still be indebted to defendant company,
" 5,483,875.55 acres, which the State wrong-
" fully withholds from defendant.

"Tenth Assignment of Error.

"The Court further erred in not holding,
" the Legislature of the State of Texas hav-
" ing, on April 22, 1882, repealed all laws
" in force granting land or land certificates
" to railroads, and the action of the executive
" department in declining to issue certificates
" by reason thereof to defendant for 623.14
" miles of completed road, the said act of
" the Legislature was in violation of the Con-
" stitution of the United States, and was an
" impairment of the obligation of defendant's
" contract, and that by reason of the wrongs
" of the State and by virtue of her prior
" laws defendant was entitled to more land
" than it had received certificates for, and
" therefore, under the facts, the State could
" not recover the lands sued for.

" Eleventh Assignment of Error.

" The Court erred, under the facts intro-
" duced in evidence, in not holding that the
" State of Texas was indebted to defendant

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" company in, to wit, 5,483,875.55 acres
" more of land than was sued for, and in
" not permitting defendant to hold the lands
" sued for in settlement of and as a credit
" upon the amount of land owing, as shown
" upon an accounting between the State and
" the defendant.

* * * * *

" THIRTEENTH ASSIGNMENT OF ERROR.

" The Court erred in not decreeing, on ac-
" count of the completion of its track west
" from San Antonio to the Rio Grande River
" in El Paso County, a distance of 623.14
" miles, in accordance with law, the said de-
" fendant was entitled to 9,970.24 cer-
" tificates authorizing the said railway com-
" pany to locate 640 acres of land by virtue
" of each certificate, amounting to 6,380,-
" 953.6 acres of land, and favorably reported
" upon.

" FOURTEENTH ASSIGNMENT OF ERROR.

" The Court erred in not giving the de-
" fendant a credit for 176 land certificates or
" 112,640 acres of land, being for eleven
" miles of completed road inspected and
" duly reported upon June 29th, 1881, by
" William P. Hardeman, who was appointed
" to inspect the same by Governor O. M.
" Roberts on June 25, 1881.

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" SEVENTEENTH ASSIGNMENT OF ERROR.

" The Court erred in not holding under " the law and the facts that the charter of " defendant company, under which it con- " structed its road from Houston, in Harris " County, to El Paso, Texas, was a valid " contract, which entitled defendant com- " pany to receive sixteen sections of land per " mile of completed road for all work done " after the Constitution of 1869 and 1870 " was amended, and that said defendant " company having constructed that part of " its road west from San Antonio while the " law of August 15, 1876, was in force, and " defendant company being entitled to lands " which it had not received by reason of the " law which repealed the grants of land to " railroads, passed April 22, 1882, and not " having had an excessive grant, the said " defendant company should have been al- " lowed, upon equitable principles, to select " the lands sued for and to hold the same " by way of estoppel against the State, as in " cases where land for sidings ARE errone- " ously granted and treated as excessive, en- " titling railroads to selection."

The foregoing assignments of errors are so interrelated that they can be presented more conveniently together. The nature of this branch of the case is such that a discussion of the defense

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on the merits is necessary to show that the constitutional objections to the Act of 1882 suffice, in connection with the rulings of the State Court, to give this Court jurisdiction to review the matter of defense now in question. We have, accordingly, concluded that a presentation of this portion of the case in the order in which an argument on the merits should be presented would have the advantage in clearness and in avoiding repetition over an argument dealing separately with the jurisdictional questions and the merits of the defense as a whole.

We desire, at the ouset, to emphasize the fact that the rights of defendant arising from the construction of its road between San Antonio and El Paso are relied on as constituting not merely a set-off or counterclaim against the State, but a defense to her suit. If the principles of law for which we shall contend are correct, those rights and the conduct of the State in respect to them go to the right of the State to maintain this action and tend to defeat a recovery and to justify a denial of her claim. Hence, the State is called upon to meet a defense and not simply a counterclaim.

The distinction just referred to is important. The State chose to treat this part of our case

as presenting only a set-off or counterclaim, and contented herself in the Court below with pleading the general immunity of a sovereign State from being sued without her consent. We shall endeavor to show that the general rule of immunity from being sued does not apply when a State has voluntarily come into court as a suitor; but, whatever be the conclusion of the Court on that question, it is clear that the sovereignty of the State cannot protect her from any *defenses* which may be urged to defeat her recovery or secure the dismissal of her suit. For instance, she is as fully subject as any other litigant to the rule, which is fundamental and universal in equity jurisprudence, that a party who comes into a court of equity seeking equitable relief must come with clean hands and must do equity in order to obtain equity.

The facts upon which this branch of the case depends are not disputed and may be stated in a few words: The amended or supplemental charter of the plaintiff in error, passed July 27, 1870, authorized it to extend its road from Columbus to San Antonio, and thence to a terminus on the Rio Grande. On August 16, 1876, the General Land Grant Act of 1876 was passed, providing "that any railroad company heretofore

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" chartered, or which may hereafter be organized " under the general laws of the State, shall, upon " the completion of a section of ten miles or more " of its road, be entitled to receive, and there is " hereby granted to every such railroad, from the " State, sixteen sections of land for every mile of " its road so completed and put in good running " order." The act contains some provisos which it is not necessary to consider in view of the decision of the Supreme Court of Texas in the case of the *G. H. & S. A. Ry. Co. vs. State*, 81 Texas, 572. Other sections of the act prescribe the usual formalities for ascertaining compliance on the part of the railroad with the provisions of the act, the issuance of land certificates, etc.

Whatever doubt there was as to the railway company's right to receive land for its road constructed west of Columbus or San Antonio was removed by the Act of 1876, *quoad* any portion of its road constructed thereafter. Its right to receive sixteen sections of land for each mile of its road constructed subsequent to 1876 is unquestionably conferred by the Act of 1876, and was expressly so decided in the case just referred to.

The Act of 1876 was passed to encourage the construction of railroads, then so much needed to

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aid in the development of the vast resources of this State. The offer of land was held out as an inducement to the investment of capital in such enterprises. This offer was accepted by the railway company; and, in consideration of the promised aid and in reliance upon the good faith of the State, it undertook the costly enterprise of constructing a railroad through the vast extent of barren territory between San Antonio and El Paso. Upon this great work, so undertaken, it expended enormous sums of money, had nearly completed its road for the entire distance of over six hundred miles, and had earned the right to patents for nearly six million acres of land, when, the work having been done and the benefits secured to the State, the repealing Act of 1882 was passed!

On April 22, 1882, an act was passed by the State repealing all land grants in aid of railroads. At the date of the passage of this act, the appellant company had actually completed and in running order enough miles of road, constructed subsequent to 1876, to entitle it to patents and land certificates far exceeding in amount or value those now claimed from it by the State. Shortly after the repealing act was passed, the entire road

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between San Antonio and El Paso was completed and in running order. This work, as a whole, was undertaken before the attempted repeal of the Act of 1876 ; the construction was carried on concurrently from San Antonio west and from El Paso east, and constituted one undertaking; hence, the right to receive land for the few miles completed subsequent to the repeal is as inviolable as the right to land earned and vested by the construction prior to the repeal.

The plaintiff in error made due application for appointment of an inspector to examine the road. But the State has refused to do any of the acts which she undertook to do in the Act of 1876 and repudiated her obligations in the premises, assigning as her sole reason the repealing Act of 1882. The proof shows that plaintiff in error has fully complied with the law in respect to the mode and manner of constructing its road and in all other respects.

In the case of *G. H. & S. A. Ry. Co. vs. State*, 81 Texas, 572, the Supreme Court decided that, if the G. H. & S. A. Ry. Co. was not entitled to receive State aid in land under its charter and the general laws prior to 1876, it was entitled to the benefits of the Act of 1876. So, if your Honors

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decide against us on the first branch of the defense, you must hold that the railway company was entitled under the Act of 1876 to receive from the State sixteen sections of land for each mile of completed road west of San Antonio.

From the foregoing it appears that the following questions are presented for decision:

First. The existence and nature of the railway company's rights growing out of the construction of its road west of San Antonio. This involves the question of the validity and effect of the repealing Act of 1882, which depends upon whether the plaintiff in error's rights in the premises were contract or vested rights protected by the Constitution of the United States from legislative impairment or repeal.

Second. The power of the Court to consider for any purpose the rights and claims of plaintiff in error now under discussion. If your Honors hold that the Act of 1876 was a mere bounty law and incapable of conferring any contract or vested rights, even after it had been accepted and acted upon and the State had received the contemplated consideration for the land granted, and, hence, that the repeal thereof was valid and effective to destroy all existing rights or claims of plaintiff in

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error thereunder, then this second branch of the defense falls to the ground. But if you conclude that the Act of 1882 is unconstitutional and null so far as it affects the rights of plaintiff in error earned by the construction of the portion of its road in question, it remains to decide whether these rights can be considered in this case. This depends upon (1) whether, when a State voluntarily comes into a court of equity seeking equitable relief, she can claim, by reason of her sovereignty, exemption from the rules which characterize the administration of justice in a court of conscience, and can insist upon relief being accorded her in violation of the fundamental principles of equity jurisprudence; (2) whether a court is powerless to grant relief against a plaintiff State, even when the relief is in the nature of a defense, or is confined to property not in the possession of the State but within the jurisdiction and control of the Court, and does not involve the issuance of any execution against the State or of any mandate requiring affirmative action on the part of any officer of the State; (3) whether, when a State voluntarily comes into court, she does not subject herself to the jurisdiction of the Court to the same extent as any other litigant, *at*

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least so far as concerns any and all legal or equitable *defenses* to her claim.

Third. The nature of the relief which plaintiff in error is entitled to receive from the Court.

We shall discuss, in the order named, the questions indicated above:

FIRST PROPOSITION.

By constructing its road between San Antonio and El Paso in consideration of the State's offer of aid in land made in the Act of August 16, 1876, *and in reliance upon the good faith of the State, the railway company acquired a contract and vested right to receive sixteen sections of land for each mile of road so constructed. The repealing Act of* 1882—*passed after the acceptance of the State's offer, after the construction in reliance thereon, at enormous expense, of six hundred miles of road, and after the State had secured the benefits of the quasi-public work, the contemplated consideration for the land grant—is, so far as it affects the company's rights, unconstitutional, null and void. It impairs the obligation of a contract, in violation of Section* 10, *Article* 1, *of the Constitution of the United States; it amounts to a deprivation of property without due process*

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of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution.

The correctness of this proposition would seem to be too clear to require argument or citation of authority. We ask leave to refer, however, to the argument and authorities heretofore presented under Heading I. of this argument. If our first proposition is sustained, the railway company has a contract and vested right to receive from the State certificates and patents for over six million acres of land, the contemplated consideration for which the State has secured and for years has enjoyed. And the State Court erred in not declaring the unconstitutionality and nullity of the Act of April 22, 1882. We now come to the next proposition.

SECOND PROPOSITION.

When a State voluntarily comes into court she subjects herself to the jurisdiction of the Court to the same extent as any ordinary litigant, at least so far as concerns any and all legal or equitable defenses to her claim. She can obtain equitable relief only when entitled to it upon principles of equity and good conscience. The rights and claims of the railway company above discussed should be considered by the Court, at least so far

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as they constitute an equitable defense, and enforced, at least so far as they afford ground for dismissing the suit of the State or conditioning the relief accorded her upon her doing justice to plaintiff in error, or for quieting the company in the possession of the land it now has.

We again direct attention to the fact that the rights of plaintiff in error arising from the construction of its road west of El Paso are urged, not merely by way of set-off and counterclaim, but as an equitable defense. Any matter constitutes an equitable defense which shows that complainant, by reason of his conduct, has no standing in a court of equity or that the relief sought should be withheld or conditioned upon his doing equity. Hence, should your Honors conclude that you are without power to entertain a set-off or counterclaim against the State, presented under the circumstances of this case, there still remains the question whether the rights of plaintiff in error here in question and the conduct of the State in reference thereto do not present a case of such unfair dealing between man and man as to require a court of conscience to withhold equitable relief from complainant.

There can be no question as to the equity nature of this suit. The State is seeking the

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cancellation of written instruments on the ground of error, and the removal of a cloud from its title. Such relief is essentially equitable in character. On removal to the United States Circuit Court, the case would certainly fall on the equity side of that court. In a State where courts of law and courts of equity are separate, it would undoubtedly have been dismissed if it had been brought in a court of law. As the courts of the State of Texas have full chancery powers and can administer equity and enforce fair dealing and good faith to the same extent as any court of exclusively equity jurisdiction, the decision of the questions now under discussion depend upon the general powers of a court of equity and the general principles of equity jurisprudence which govern the administration of justice in a court of conscience.

Whether the demand is snch as in equity and good conscience ought to be enforced is not affected by the sovereign character of the complainant. As was well said by Judge SAWYER in *United States vs. Dalles Military Road Co.*, 41 Fed. Rep., 493, p. 501 :

> " Whatever is inequitable, as between
> " man and man, in their dealings with each

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" other, should also be deemed inequitable,
" as between the United States and those
" with whom they condescend to deal, under
" like circumstances."

Let us now repeat briefly the case made out by plaintiff in error :

We show that we constructed our road to El Paso at enormous cost in the just expectation of the faithful performance by the State of her promise and her contract to give us sixteen sections per mile for each section of ten miles completed, and that, by the construction of the road we earned and became entitled to receive patents for over six million acres of land, patents far exceeding in amount and value those sought to be canceled in this suit; that on a fair accounting the State would owe us ten times as much land as she seeks to recover, and we claim that, if we are not otherwise entitled to the land sued for, we are entitled to it by reason of the construction of the road to El Paso.

We charge that the State unjustly and illegally (for an unconstitutional law affords no legal justification) refused to issue to us the patents we have earned or to recognize in any way our rights to the land we are entitled to receive. We

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charge that the conduct of the State in seeking to take from us a few hundred thousand acres of land when she owes us many millions is grossly unjust, unfair and oppressive, and is contrary to equity and good conscience.

We claim that a court of equity can and should consider the rights and claims of defendant and the conduct of the State in respect to them, and, if it finds that the State has unjustifiably refused to recognize her obligations in the premises, it should deny the State the equitable relief she seeks, or grant it only upon condition that she do equity and consent, if her consent be necessary, to have the railway company's rights and claims passed upon in this cause, in order that the Court may do complete justice.

We claim, moreover, that plaintiff in error is at least entitled to have its rights arising from the construction of its road to El Paso recognized and enforced *quoad* the land sued for, which is not in the possession of the State, but within the jurisdiction and control of the Court; and that, by reason of its rights and the obligations of the State in the premises, defendant is at least entitled to be quieted in the possession of the land it has received from the State.

We deny that the general immunity of the State from being sued affords any reason why the Court cannot consider, for the purpose and to the extent indicated, that portion of defendant's case now under discussion. We maintain that when a State voluntarily comes into court as a suitor she submits herself to the jurisdiction of the court as any other suitor, and stands in no other or better position than any other litigant; that her right to equitable relief has to be decided by the general principles of equity jurisprudence; that when she comes into a court of equity she must do so with clean hands; that when she seeks equity she must do equity; that she can never expect a court of conscience to grant her relief in respect to a demand which is contrary to equity and good conscience; that, if she wishes to use her immunity from suit to withhold from a citizen his just rights, she must not pursue that citizen before the bar of a court of conscience, for such a Court will require her to do justice before it will give her justice.

These principles are so consonant with the general principles of right and justice that we believe they would command your Honors' acceptance even if the courts had not spoken on the subject.

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On the other hand a Chancellor should be loath to assent to the contention of the State that she can ask the Court to cancel patents issued to the railway company in consideration of work done of quasi-public character, the benefits of which have been enjoyed by the State, work undertaken under the belief which, to say the least, was shared in by all the departments of the government at the time, that the company would thereby earn these patents; that she can seek the cancellation of these patents when on a fair accounting she would owe the company patents far exceeding in number and amount those which she attacks, and that, in the prosecution of such a claim, she can shelter herself behind her supposed immunity from suit and shut off all inquiry as to her indebtedness and obligations to defendant for the same kind of property arising out of the construction of the same road.

We submit that the position of the State on this branch of the case is abhorrent to one's sense of justice, and is so unfair in principle, so unjust in its consequences, that your Honors should find it difficult to accept it as a law to govern a court of conscience.

This question must be decided on broad prin-

ciples of equity and justice. It is the proud function of a court of equity to do complete justice in any matter before it, to prevent oppression and bad faith, and to compel the complainant, if necessary, to perform his obligations as a condition to obtaining the relief he seeks. In the accomplishment of this purpose it is allowed the greatest latitude in the form of decrees it may render. It has full power to render a decree to suit the requirements and the special equities of each case. It owes its origin to the want of elasticity in the common-law writs and remedies. Hence, if the English language can formulate a decree which will accomplish what is just and right in respect to the lands which are the subject of this suit and fully within the Court's jurisdiction, a court of chancery has power to render it.

> " It is said the orders issued in this case
> " are without precedent. Every just order
> " or rule known to equity courts was born
> " of some emergency, to meet some new con-
> " ditions, and was, therefore, in its time,
> " without a precedent. If based on sound
> " principles, and beneficent results follow
> " their enforcement, affording necessary re-
> " lief to the one party without imposing

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" illegal burdens on the other, new remedies
" and unprecedented orders are not unwel-
" come aids to the Chancellor to meet the
" constantly varying demands for equitable
" relief. Mr. Justice BREWER, sitting in
" the Circuit Court of Nebraska, said:

" 'I believe most thoroughly that the pow-
"' ers of a Courtof Equity are as vast, and
"' its processes and procedure as elastic, as
" ' all the changing emergencies of increas-
" ' ingly complex business relations and the
" ' protection of rights can demand.'

" Mr. Justice BLATCHFORD, speaking for
" the Supreme Court, in Joy vs. St. Louis,
" 138 U. S., 1; 11 Sup. Ct. Rep., 243, said:

" '* * * It is one of the most useful
" ' functions of a court of equity that its
" ' methods of procedure are capable of being
" ' made such as to accommodate themselves
" ' to the development of the interests of the
" ' public in the progress of trade and traffic
" ' by new methods of intercourse and trans-
" ' portation ' " (*Toledo, etc., R. Co. vs. Penn. Co.*, 54 Fed. Rep., p. 751.)

All that our case requires and all that we ask of the Court is to hold that, on the case made out by the record, the plaintiff in error, by the construction of its road to El Paso, has earned the right to receive lands from the State; that the State withholds these lands and refuses to issue

certificates or patents therefor; that this conduct of the State may be considered by this Court in respect to the relief sought by her as a suitor in this Court; that these rights of plaintiff in error may be considered in determining whether the State has come into court with clean hands, in determining whether she is entitled to any relief from a court of conscience until she does justice to plaintiff in error, or consents, if her consent be necessary, to have its claims passed upon in this suit; or that the rights of the plaintiff in error to receive land from the State may be considered so far, at least, as regards the land brought within the control of the Court by this suit, and enforced to the extent, at least, of quieting plaintiff in error in the possession of the land it has already received.

Such relief does not involve the taking of any property from the State, or the issuance of any execution against the State, or of any mandate requiring affirmative action on the part of any officer of the State. It simply involves the recognition and protection of the rights of the railway company *quoad* property not in possession of the State and within the jurisdiction and control of the Court. Relief of this character

and to this extent this Court certainly has power to grant.

We shall now briefly call attention to some authorities which, it is believed, show that this Court has power to entertain, and should entertain, that portion of plaintiff in error's case which sets up the unconstitutionality of the act of 1882 and its rights to land earned by the construction of its road to El Paso, at least so far as to recognize and decree the existence of those rights, and to enforce them at least *quoad* property in possession of the company and brought by this suit within the jurisdiction and control of this Court, or, by reason of those rights, to quiet the company in the possession of the property sued for, or turn the complainant out of court.

1. *Abeel vs. Culbertson*, 56 Fed. Rep., 329 :

Some of the questions in this case are identical with some of the questions presented in the case at bar; and the other questions involved are so analogous as to make the decision in the Abeel case directly applicable to the instant case. The Abeel case originated in the State Court in a suit by the State to cancel certain patents issued to the Waco and Northwestern Railroad Co., of which Abeel was Receiver. Defendant peti-

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tioned for the removal of the case to the Federal Court on the ground that the case presented issues that depended on a construction of the Constitution and laws of the United States. The State Court declined to order the removal of the cause. Defendant filed a transcript of the record in the Federal Court, and sought to enjoin the prosecution of the case in the State Court.

In passing upon the application for an injunction the Court had to decide whether the case had been properly removed, and also how far the general immunity of a sovereign State from being sued prevented a Court from doing complete justice between the parties in a suit instituted by the State.

After deciding that the case presented Federal questions and was properly removed, Judge McCormick thus disposed of the contention that the Court could entertain no demand of defendant against the State, because to do so would be to entertain a suit against a State:

> "We have no difficulty in holding that "the State, when she brings a suit against "citizens or other parties, accepts all the "conditions that affect the ordinary suitors, "except that no affirmative judgment, as for

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"the payment of costs, can be rendered
"against her. The Eleventh Amendment to
"the Constitution only exempts her from
"suits commenced or prosecuted by others.
"When she institutes a suit against a citi-
"zen, and cites him to answer, she cannot
"draw the mantle of sovereignty about her,
"and bid him, thus challenged, contend with
"her under any disability imposed by the
"Eleventh Amendment; she comes into court
"as any other plaintiff, so far as her oppo-
"nent's right to defend is concerned. There-
"fore, we consider that the motion for in-
"junction made in this case should be
"viewed in the same way exactly as if the
"Attorney-General in his individual capacity
"was the party, and the State was not the
"party. Whether the State is the party or
"not makes no difference in this matter.
"She being a party plaintiff to the litigation,
"the suit one of her own voluntary institu-
"tion, and now properly removed to and
"pending in the Circuit Court, this motion
"should be determined as if she were an
"ordinary suitor."

In this opinion Judge BRYANT concurred.

2. *Clark vs. Barnard*, 108 U. S., 436, 447, 448:

This was a suit by the assignee of a railroad company to recover from the Treasurer of the State of Rhode Island a certificate representing a right to receive $100,000 deposited with the

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City of Boston. Pending the suit the money was brought into court by the city, and the State intervened and claimed the money.

Objection was made that the suit for the recovery of the certificate from the Treasurer was in effect a suit against the State and the State's immunity from suit was pleaded. In answer to this the Court said :

> " We are relieved, however, from its con-
> " sideration by the voluntary appearance of
> " the State in intervening as a claimant of
> " the fund in court. The immunity from
> " suit belonging to a State, which is re-
> " spected and protected by the Constitution
> " within the limits of the judicial power of
> " the United States, is a personal privilege
> " which it may waive at pleasure, so that in
> " a suit, otherwise well brought, in which a
> " State had sufficient interest to entitle it to
> " become a party defendant, its appearance
> " in a Court of the United States would be
> " a voluntary submission to its jurisdiction ;
> " while, of course, those courts are always
> " open to it as a suitor in controversies be-
> " tween it and citizens of other States. In
> " the present case the State of Rhode Island
> " appeared in the cause and presented and
> " prosecuted a claim to the fund in contro-
> " versy, and thereby made itself a party to
> " the litigation to the full extent required
> " for its complete determination. It became

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" an actor as well as defendant, as by its in-
" tervention the proceeding became one in
" the nature of an interpleader in which it
" became necessary to adjudicate the adverse
" rights of the State and the appellees to
" the fund to which both claimed title."

3. *Hans vs. Louisiana*, 134 U. S., 1, 20:

In discussing the doctrine of a State's immunity from suit, Judge BRADLEY, the organ of the Court, said :

"To avoid misapprehension, it may be
" proper to add that, although the obliga-
" tions of a State rest for their performance
" upon its honor and good faith, and cannot
" be made the subject of judicial cognizance
" unless the State consents to be sued, *or*
" *comes itself into court*, yet, where prop-
" erty or rights are enjoyed under a grant
" or contract made by a State, they cannot
" wantonly be invaded. Whilst the State
" cannot be compelled by suit to perform its
" contracts, any attempt on its part to vio-
" late property or rights acquired under its
" contracts may be judicially resisted, and
" any law impairing the obligation of con-
" tracts under which such property or rights
" are held is void and powerless to affect
" their enjoyment" (*Id.*, pp. 20, 21).

Attention is called to the words we have italicized, which show that the Court considers the

State's coming into court, and its consent to be sued, as equally conferring jurisdiction on the Court to enforce the contract obligations of the State.

4. In this connection the words of Justice SWAYNE in *Davis vs. Gray*, 16 Wall., 203, 232, are pertinent:

> "When she [the State] or her representa-
> "tives are properly brought into the forum
> "of litigation, neither she nor they can as-
> "sert any right or immunity as incident to
> "her political sovereignty."

5. So in *Railroad Co. vs. Mississippi*, 102 U. S., 135, it is declared that the exclusion by the Eleventh Amendment of the Constitution of the judicial power from suits brought against a State does not apply to a suit brought by a State (see p. 140 at bottom).

9. *United States vs. Budd*, 43 Fed. Rep., 630, 633, 634:

In this suit the United States sought the aid of a court of equity to have canceled certain patents to land issued in error of law and without authority. The Court finding that there had been no intentional misconduct or fraud on the part of the defendants, and that the issuance of

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the patents was due as much to the error of the officers and agents of the plaintiff as of defendant, laid down for the government of such a suit the principles of equity for which we are now contending:

> "When the Government of the United "States seeks relief from a court of equity, "it is as much bounden as any individual "suitor by the rules of equity. It can obtain "such relief only when entitled to it upon "principles of equity and good conscience" (citing authorities, p. 633).

7. *State vs. Morgan*, 12 Southwestern Rep., 243, 244 (Supreme Court of Arkansas, 1889):

This was a suit by the State of Arkansas to recover land alleged to have been illegally patented to the defendant. The Court held that the proper remedy of the State was by suit in equity. In the course of the decision the Court laid down as applicable to such a case the principles of law and equity for which we are now contending, viz.:

> "It is a familiar principle of equity juris- "prudence that 'when a complainant comes "'before a court of conscience, invoking its "'aid, such aid will not be granted except "'upon equitable terms'" (p. 244). "It

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" has been held that the sovereign is not " bound by any statute of limitations or " barred by the laches of the officers, in suits " to enforce a public right; yet it must re- " ceive its relief in accordance with the gen- " eral principles of equity, and not in viola- " tion of those terms " (p. 245). "The Court " can render no judgment against the State, " but it may impose equitable terms in " administering relief, and make a full com- " pliance with them a condition to its enjoy- " ment " (p. 245).

The fact that the property concerned in this suit is not in the possession of the State, but within the jurisdiction of the Court, is of controlling importance in determining the power of the Court to adjudicate upon the rights of plaintiff in error at least so far as they affect its right to retain the lands already in its possession.

1. *Cunningham vs. Macon & Brunswick R. R.*, 109 U. S. 446, 451 :

In this case Justice MILLER, speaking for the Court, classified the different cases in which relief had been granted against the State notwithstanding its general immunity from being sued. Our case falls under the first class of cases discussed, which are thus defined :

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"(1) It has been held in a class of cases "where property of the State or property in "which the State has an interest comes be- "fore the Court and under its control, in the "regular course of judicial administration, "without being forcibly taken from the pos- "session of the Government, the Court will "proceed to discharge its duty in regard to "that property. And the State, if it chooses "to come in as plaintiff, as in prize cases, "or to intervene in other cases when "she may have a lien or other claim "on the property, will be permitted to "do so, but subject to the rule that "her rights will receive the same considera- "tion as any other party interested in the "matter, and be subjected in like manner to "the judgment of the Court. Of this class "are the cases of The Siren, 7 Wall., 152, "157; The Davis, 10 Wall., 15, 20; and "Clark vs. Barnard and others, 108 U. S.

2. *The Siren*, 7 Wall., 152, 154:

The "Siren" was a vessel captured by the United States for blockade running. While being conducted to Boston she ran into and sank another vessel. The collision was due to the fault of those in charge of the "Siren." She was libeled by the United States, condemned as lawful prize and sold, and the proceeds deposited in the treasury of the United States. The owners of

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the sunken vessel intervened in the prize proceedings and claimed damages and prayed that the same be paid out of the proceeds of the sale. On objection that the intervention was a claim against the United States, it was dismissed by the District Court.

On appeal the Supreme Court stated very emphatically the general immunity of the United States from being impleaded in a direct suit for damages or anything else, saying that the same exemption from judicial process extends to the property of the United States, and that they agreed with the District Judge, that "there is "no distinction between the suits against the "Government directly and suits against its "property."

> "But," they go on to say, "although di-
> "rect suits cannot be maintained against
> "the United States, or against their prop-
> "erty, yet, when the United States institute
> "a suit, they waive their exemption so far
> "as to allow a presentation by the defend-
> "ant of set-offs, legal and equitable, to the
> "extent of the demand made or property
> "claimed, and when they proceed *in rem*
> "they open to consideration all claims and
> "equities in regard to the property libelled.
> "They then stand in such proceedings, with

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" reference to the rights of defendants or " claimants, precisely as private suitors, ex- " cept that they are exempt from costs and " from affirmative relief against them be- " yond the demand or property in contro- " versy. In *United States vs. Ringgold* (8 " Pet., 444) a claim of defendant was al- " lowed as a set-off to the demand of Gov- " ernment. ' No direct suit,' said the Court, " ' can be maintained against the United " ' States. But, when an action is brought " ' by the United States to recover moneys " ' in the hands of a party who has a legal " ' claim against them, it would be a very " ' rigid principle to deny to him the right " ' of setting up such claim in a court of " ' justice, and turn him round to an appli- " ' cation to Congress.' So in *United States* " *vs. Macdaniel*, 7 Pet., 16, to which reference " is made in the case cited, the defendant " was allowed to set off against the demand " of the Government a claim for services as " agent for the payment of the navy pension " fund, to which the Court held he was " equitably entitled. The question, said the " Court, was whether the defendant should " surrender the money which happened to " be in his hands, and then petition Con- " gress on the subject; and it was held " that the Government had no right, legal " or equitable, to the money" (pp. 154–5; see, also, U. S. vs. Bank, 15 Peters, 377).

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The decision contains an interesting and instructive discussion of the right and propriety of the Court's entertaining claims for money or property against the sovereign when the sovereign is already in court as a suitor, or when there is money or property not in the possession of the sovereign, and so within the control of the Courts, that relief can be afforded *quoad* the funds or property without requiring affirmative action on the part of the State.

3. *The Davis*, 10 Wall., 15 :

The principles set forth in The Siren, *supra*, were repeated in the above case. The syllabus sufficiently indicates the nature of the case and the views of the Court.

> " Personal property of the United States
> " on board of a vessel for transportation
> " from one point to another is liable to a
> " lien for salvage services rendered in saving
> " the property. Such lien cannot be enforced
> " by the Courts by a suit against the United
> " States.
>
> " Nor by a proceeding *in rem*, when the
> " possession of the property can only be had
> " by taking it out of the actual possession of
> " the officers or agents of the Government
> " charged therewith.
>
> " It may be enforced by a proceeding *in*

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" *rem* where the process of the Court can
" be enforced without disturbing the posses-
" sion of the Government, which, being thus
" compelled to appear in court to assert its
" claim, must discharge the lien before the
" property will be delivered to it.

" To deprive the Court of jurisdiction the
" possession of the State must be actual, not
" constructive."

See, also, U. S. vs. Bank, 15 Peters, 377.

We invite special attention to The Siren, *supra*. It is ample authority for our contention that the Court has full power to entertain any equitable set-off or counterclaim against the State *quoad* the land not in the possession, actual or constructive, of the State, but within the jurisdiction and control of this Court. The reasoning and the authorities cited in that case also show that, in dealing with equitable defenses and counterclaims against a State, the Court should consider that the defendant would be practically remediless if his claims were not considered in cases where the State had voluntarily appeared as suitor. The reason for not entertaining a counterclaim not closely connected with the main demand is that defendant can easily enforce his claim in another suit. The reason failing

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where the claim is against a State, the courts are justified in entertaining a claim set up by way of equitable defense or set-off or counterclaim against a State which it would have required to be made the subject of a direct independent action if the suit had been between private individuals.

We maintain, however, that the claims of the State and of the plaintiff in error are closely connected. Plaintiff in error's road to El Paso is one road constructed under one charter, and represents a single enterprise undertaken and continued in reliance upon the State's promise of aid in land made in the charter and in the various land-grant acts, the last of which was the Act of 1876. The rights earned by the construction of the road are so related by the unity of the enterprise, of the corporation undertaking it, and of the resulting railroad, that they cannot be divided into separate and independent parts. Moreover, the fact that the claims of the State and of the railway company are directed towards the same thing—the land sued for—connects them sufficiently to justify the consideration of both in this suit. It does not lie in the mouth of the State to say that the claims to land for the con-

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struction of the road to El Paso have not been defined and are not evidenced by patents. She cannot profit by her own wrong. She cannot urge against plaintiff in error the results of her own refusal to perform her obligation to issue certificates and patents. We have here a proper case for the application of the rule that equity will regard what ought to have been done as done. In an analogous case the Supreme Court of this State, referring to conduct of the State, said:

> " Now, it is a familiar principle of the law " of contracts that, if one party is prevented " from fully performing his contract by the " act of the other party, the party in fault " cannot be allowed to take advantage of " his own wrong, and screen himself from " payment for what has been done under " the contract " (*Railroad Co. vs. Commissioner, etc.*, 36 Texas, p. 393).

Speaking of the powers of a court of equity to grant relief, in the nature of an equitable set-off, against a demand which, in justice and good conscience, ought not to be enforced, the Supreme Court of the United States said in *Rolling Mill Co. vs. Ore and Steel Co.*, 152 U. S., p. 615:

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> "Cross-demands and counterclaims, whether arising out of the same or wholly disconnected transactions, and whether liquidated or unliquidated, may be enforced by way of set-off whenever the circumstances are such as to warrant the interference of equity to prevent wrong and injustice."

We have not been referred to, nor have we been able to find, a single authority holding that a State is entitled to relief in a court of equity when, under the same circumstances, such relief would be withheld from an ordinary suitor because his demand was inequitable and contrary to justice and good conscience. A sad spectacle would be presented by a court of equity endeavoring to administer justice in suits by a State, shorn of its essential attributes, without power to restrain unfair dealing or to take notice of complainant's bad faith and unconscionable treatment of defendant!

THIRD PROPOSITION.

Defendant is entitled to, and the Court has full power to render, a decree dismissing the suit on the ground that, under the circumstances, the complainant's demand is unconscionable, or a

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decree withholding the relief sought unless and until the complainant performs in good faith her obligations to defendant, or a decree quieting defendant in the possession of the land it now has on the ground that, if not otherwise entitled thereto, it is entitled to receive and hold it as part of the agreed consideration for the construction of its road to El Paso.

This proposition has been anticipated and covered by the argument and authorities in support of the Second Proposition.

As there is no distinction in this State between courts of law and courts of equity, and as the State courts administer legal or equitable relief, or both, as the nature of the case demands, this Court, having all the powers of a court of chancery, is fully competent to render in this case such a decree as will do complete justice between the parties. In the case of *G. H. & S. A. Ry. Co. vs. State*, 81 Texas, 572, the Supreme Court of Texas rendered a special decree to fit the equitable requirements of the case before it ; so your Honors can now render a decree which will meet the particular equities arising from the just rights of the railway company and the unfulfilled obligations of the State, created by the construction of the

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portion of the road between San Antonio and El Paso under the circumstances detailed above. Hence, the authorities we have cited as to the obligation of the State to do equity when she seeks equity and as to the power of a court into which a State has come as a suitor to entertain and enforce claims against her *quoad* property brought by the litigation within the jurisdiction of the Court, are applicable to the cause in this Court.

Considering the strong equities of the railway company's case, the obligations of the State growing out of the construction of the same road, that on a fair accounting she would owe appellant patents or certificates many times exceeding in number or value those she seeks to cancel, and that appellant is remediless unless complete justice is done in this cause, we submit that this Court should render a decree which will, at least, quiet appellant in the possession of the land it now has. As was stated above, such relief does not involve the taking of any property from the State, or the issuance of any execution against the State, or of any mandate requiring affirmative action on the part of any officer of the State. It involves simply the recognition and protection of

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the rights of plaintiff in error *quoad* property not in possession of the State and within the jurisdiction and control of the Court. It is not affirmative relief against a State, but merely negation of relief to the State.

It was urged in the State Court that the public land was exhausted. To this we reply that we are not seeking to recover from the State any of the exhausted public land. The inequity of the State's case does not consist so much in her withholding from us something she owes us and still has in her possession, but in seeking to wrest something from us when at the same time she owes us twice as much of the same thing. Her very inability, if it exists, to give us the patents and certificates we have fairly earned, makes it inequitable and unjust for her to attempt to take away a far less quantity of patents and certificates which were received from her for the construction of the same road in respect to which her indebtedness arose.

Suppose A promised to give B 1,000 bales of cotton to build him a certain road, and, while B was at work, A disposed of all of his cotton, so that when the work was finished he had no cotton wherewith to pay for it. Is not A as much

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in default as if he had the cotton and refused to give it to B? Suppose there had been a previous transaction between the parties, in virtue of which B had constructed another piece of road for A and had received 500 bales of cotton therefor. If A, finding a flaw in the last-mentioned transaction, were to bring suit to recover the 500 bales, while enjoying the full benefit of the road, and came into a court of equity for relief, would not such a Court consider his obligation to B for the 1000 bales and refuse to permit him to recover the 500 bales, and would A's conduct be considered any the less reprehensible because he had put it out of his power to pay the 1000 bales? Would not the Court be all the more disposed to withhold aid if, by reason of A's character, B should not bring suit against him.

We submit that, if the public land became exhausted at any time after we accepted the State's offer of aid in land, the equities of the case are not in the least affected thereby; and, as we ask only to be quieted in the possession of the land we now have, the exhaustion of the public land can have no effect upon the relief we seek.

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III.

We shall now take up the assignment of error based on the action of the State Court in refusing the application of defendant in the Court below, plaintiff in error here, to remove the cause into the Circuit Court of the United States, and in proceeding with the cause after the presentation of the petition and bond for such removal. A decision upon the question of the right to remove requires a familiarity with the whole case now before this Court for review. Hence, in order to avoid repetition, we postoned a discussion of that question until the nature of this case was fully shown by the argument upon the merits. In view of what has already been written, the presentation of this branch of the case will be very brief.

The State's petition filed in the Court below alleged that the Buffalo Bayou, Brazos and Colorado Railway Company was chartered by the special Act of February 11, 1850. It also alleged "that by the special Act of the Legislature of "the State of Texas, approved July 27th, 1870, "the name of the Buffalo Bayou, Brazos and "Colorado Railway Company was changed to

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"the Galveston, Harrisburg and San Antonio "Railway Company, the defendant," etc. It also alleged that at the time the aforesaid Act of July 27th, 1870, was passed, "the Constitution "of 1869–70 forbade the Legislature from au- "thorizing or granting lands to railway com- "panies for the construction of their roads, "though no lands were granted by said act;" and also alleged that the issuance of the certificates described in the petition was "in violation "of the constitution and laws of this State," etc. It sufficiently appeared from this petition, and also from the aforesaid Act of July 27th, 1870, specially pleaded therein, that part of your plaintiff in error's line of railway, extending from Harrisburg to Columbus, had been constructed and was in operation prior to the adoption of the Constitution of 1869.

Plaintiff in error in due time presented to the Court below its application to remove this cause into the Federal Court upon the ground, in effect, that the suit was one arising under the Constitution and laws of the United States. It was claimed in effect, in the petition for removal, as well as in the original answer filed therewith, that plaintiff in error had proceeded under its

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charter granted by the special Act of February 11th, 1850, and the acts amendatory thereof and supplementary thereto, to construct, and had constructed, prior to the adoption of the Constitution of 1869, a large and important part of its line of railway—*i. e.*, from Harrisburg to Columbus—and had acquired thereby, and under the special acts relating to it, and under the general laws referred to by such acts, a contract and vested right to sixteen sections of land for each mile of road which it should construct, and that the Constitution of 1869, pleaded by the State in its original petition, impaired the obligation of such contract, in violation of Section 10, Article 1, of the Constitution of the United States, and deprived plaintiff in error of property without due process of law, in violation of Section 1 of the Fourteenth Amendment of said Constitution. The application to remove was denied by the Court below, to which ruling petitioner duly excepted.

It appeared from the special acts incorporating and relating to plaintiff in error, as pleaded in the State's original petition, and from the general law of January 30th, 1854, referred to in and made a part of such special acts, that

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plaintiff in error was entitled to sixteen sections of land for each mile of road it should construct, unless the grant thus made had been in some manner withdrawn; and the Constitution of 1869 was specially set up by the State in its petition as a reason why the railway company was not entitled to the grant for the construction of its line to San Antonio. By reference to the special laws mentioned in the State's petition it appears that the railway company was incorporated by the special Act of February 11th, 1850; that by the Act of January 29th, 1853, it was granted eight sections of land for each mile of its road; that by an Act of February 4th, 1854, it was granted all the rights, privileges and benefits accruing from any general law or laws that had been or might thereafter be passed by the State to encourage the construction of railroads in the same manner and to the same extent as if the gauge of its road was the same as then fixed or might be thereafter fixed upon by the State; and this had the effect of conferring upon the company the land grant provided by the general law of January 30th, 1854, which was then in force. It also appeared from another special Act of February 4th, 1854, that

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the route of the company's road was restricted to an extension of their existing road to Austin, etc.; and it appeared in the special Act of July 27th, 1870, pleaded in the State's petition, that such restriction with respect to route was removed by that act. It further appeared from the Act of July 27th, 1870, pleaded by the State that the railway company had constructed its road from Harrisburg to the Colorado River, which necessarily involved a very large expenditure of money, prior to the adoption of the Constitution of 1869.

It appears, as above stated, from "the plaintiff's statement of his own claim," as contained in the original petition, and from the special laws referred to therein, read in the light of the general laws granting lands to railroads, that plaintiff in error had a contract with the State for sixteen sections of land for each mile of road it should construct; that it had accepted the grant and performed, at a large expense, an important part of its contract by constructing, in pursuance of the same, a large part of its lines prior to the adoption of the Constitution of 1869, and had thereby become invested with the rights created by said contract, and that, if it was not entitled

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to the land sued for, it was only because the Constitution of 1869 repealed the legislation referred to, which had ripened into a contract between the State and the railway company. The State could not possibly recover without invoking the Constitution of 1869. It abundantly appeared, therefore, from plaintiff's statement of its own case, as contained in its original petition, that plaintiff in error had, by reason of the legislation mentioned and the construction of a part of its road thereunder, a contract right to the land sued for, which was impaired by the Constitution of 1869, and that even under the rule laid down in TENNESSEE vs. UNION BANK, 152 U. S., 454, the case was removable.

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IV.

In the statement of the case we called attention to the State's plea of estoppel, based on the argument alleged to have been made on behalf of plaintiff in error by its then counsel in former litigation with the State. The case is reported in 17 Sou. West. Rep., 67 (81 Tex., 572), under the title of G. H. & S. A. Ry. Co. vs. State. This plea was not sustained by the Court which decided the case pleaded by way of estoppel, and we do not apprehend that your Honors will take a different view of the matter. As it is a specious plea and seems on its face to show that the railway company has assumed inconsistent positions in respect of its land-grant rights, we submit now the argument we presented when the question was before the State Court.

Discussion of the Case of G. H. & S. A. Ry. Co. vs. State (81 Texas, 572; 17 Sou. West. Rep., 67).

The object of this suit was to recover 60 sections of land located and surveyed for the company under 60 alternate certificates issued July 12, 1877. The certificates referred to the road

between Guadalupe Bridge and San Antonio, and purported on their face to have been issued under the Act of January 30, 1854, and acts amendatory thereof. The grounds of action set forth in the petition were:

1. The certificates were issued under the Act of January 30, 1854, and acts amendatory thereof, all of which laws had expired by their own terms and limitations, and were repealed by the Constitution of 1869 and other Acts of the Legislature before the construction of the road for which the certificates were issued.

2. The company, in procuring said certificates, had falsely and fraudulently misrepresented the length of the completed section for which certificates were claimed, stating it to be 36 miles and 1,474 feet of main track and 2 miles 2,000 feet of side-track, when in reality there were only 30 miles 1,205 feet of main track, the rest being side-track.

3 and 4. The 2 miles 2,000 feet of side-track were not connected with the section for which the certificates were issued, but pertained to sections of the road previously completed for which certificates had already been obtained. And the certificates referred to in the

petition were issued for the 8 miles 2,269 feet of sidings, for the construction of which the company was not entitled to the aid of the State by any laws general or special.

5. The sidings in question were necessary appurtenances, etc., of defendant's railway.

6. It could not be determined from the face of the certificates, or otherwise, which were located and surveyed for sidings and which for main track.

The prayer of the petition was for a recovery of the lands and a cancellation of the certificates.

The answer denied that the misrepresentation as to the mileage of main-track siding was intentional or due to defendant's fault, averring that it was an error of the State's engineer. It contained other averments which the Court states "it is not necessary to notice" (p. 68).

By supplemental petition the State said:

> "The defendant was never entitled to re-
> "ceive the lands in controversy, or any
> "other lands in aid of constructing its rail-
> "way west of the Guadalupe Bridge, for the
> "reason that, by the terms of its charter,
> "passed July 27, 1870, and the amendments
> "passed March 10, 1875 (mentioned in
> "plaintiff's petition), which were referred

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" to and made part hereof, it was required
" to, and undertook to, complete its said
" road to San Antonio on or before January
" 26, 1876, conditioned that, in the event it
" failed to do so, it would forfeit all the
" rights, powers and privileges therein con-
" ferred. That it failed to so construct or
" complete its said road to said place within
" said time—on or before January 26, 1876
" —and, therefore, it *ipso facto*, by the terms
" of its said charter contract, which the
" State here pleads, interposes and demands
" to be enforced, lost and forfeited all its
" rights and all privileges, immunities, grants
" of lands, if any it ever had, held or was
" entitled to by virtue thereof."

The lower Court made a detailed finding of facts as to the number of certificates issued to defendant, for what portion of road issued, the extent and manner in which certificates for main track and sidings had been issued by the successive officers and agents of the Government, etc., and that defendant's road from Guadalupe Bridge to San Antonio was constructed and completed between November 17, 1876, and February 13, 1877, and the sidings between October 31, 1876, and February 13, 1877.

The judgment of the lower Court was that the State recover the lands sued for and that the cer-

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tificates be canceled. The judgment was based on the conclusion of law that, as the law did not authorize a railroad to receive land for the construction of sidings, the certificates in question, showing on their face that they were issued for sidings and main track indiscriminately, were illegal and void.

The appellant assigned for error that the Court erred in its conclusions of law; that the laws did not grant lands for sidings, and that the certificates in suit were null and void.

The Attorney-General urged in the Appellate Court that "by reason of its delay in construct-" ing its road to San Antonio" the appellant did not acquire a right to any lands, and for this reason the judgment should be affirmed, even though the conclusion of law of the lower Court were wrong. To this the Court said if the judgment was correct it would not be reversed because a wrong reason was given for it.

The following questions were presented to the Court for decision and were decided in the order named:

1. Did the defendant by the construction of its road to San Antonio acquire a right to any lands under any laws?

2. If so, was it entitled to receive lands for sidings?

3. If not, did the issuing to it of certificates indiscriminately for main track and sidings avoid the entire issue of certificates?

Before passing upon the rights of defendant to receive lands under any laws, the Court had to decide whether it had forfeited its charter by failure to complete its road to San Antonio within the limit prescribed in its charter. This preliminary question was decided in favor of the defendant, the Court holding that the failure to construct the road within the stated period was merely a potential ground of forfeiture which the State might have enforced, if it chose, in a direct action for the purpose.

The Court then approached the question of defendant's right under any laws to any land for the construction of its road to San Antonio. There were two sources from which defendant's right to receive lands might be derived, viz.: First, under the Act of January 30, 1854, and acts amendatory thereof, in connection with its charter and its amendments; second, under the General Land Grant Act of August 16, 1876. These two sources of title were not so inconsist-

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ent that defendant could not urge them in the alternative. It had a right to lands under its charter and laws prior to the act of 1876; or, if not, it was entitled to them under the Act of 1876. Hence, there were two possible roads by which the Court might reach the same conclusion; namely, the right of defendant to receive lands. Was it necessary for the Court to hew its way through both roads when it could reach a conclusion by traversing only one?

The Attorney-General endeavored to block both of the possible sources of defendant's title. To the claim based on its charter and laws prior to 1876, he opposed that the Act of January 30, 1854, and acts amendatory thereof, had expired by their own terms and limitations, and were repealed by other acts of the Legislature and by the Constitution of 1869 before the portion of the road in question had been constructed (see statement of grounds of action at beginning of the opinion). To the claim under the Act of 1876 he opposed that the failure of the defendant to construct its road within the charter limit excluded it from the benefits of the Act of 1876 by reason of the proviso that the act "shall not "be construed to renew or continue any right to

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" companies who have failed or may fail to " comply with the terms of their charters, with " reference to the completion of portions of their " roads in stated times."

The contention of the Attorney-General as to the absence of any right in defendant to receive land under laws prior to 1876 presented for decision many grave and difficult questions of statutory construction and constitutional law. For instance, it involved the meaning and effect of the legislation of 1862 and 1866, extending for stated times the provisions of the General Land Grant Act of 1854, the competency of the Legislature at that time to enact such laws, the constitutionality of such legislation, the meaning of the prohibition of land grants in the Constitution of 1869, the rights of defendant under Section 11 of the charter of 1870 in connection with the Constitutional Amendment of 1873, and the numerous special grants of lands in aid of particular roads passed after the amendments and prior to the construction of the portion of its road under discussion. All these questions were involved in the contention of the Attorney-General, and would have been argued and urged by the de-

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fendant had its counsel not seen a shorter way out of the difficulty.

Courts show their human element by preferring the easiest way to a desired result. So the Court, in this case, finding that the argument of defendant suggested an easy solution of the difficulty, adopted the short cut afforded by the seeming tacit concession of counsel. The position of defendant's counsel was that, if everything contended for by the Attorney-General, in respect to the defendant's right (or want of right) to lands under laws prior to 1876 be true (and for the sake of argument it might all be conceded to be true), the only result was to make clear defendant's right to the land under the Act of 1876. The question with which the Court was then concerned was whether defendant had a right to land for the construction of the portion in question under any laws, and it made no practical difference to the State or to the defendant whether the Court found it entitled to the land under the Act of 1876, or under prior laws.

The main subject of controversy in this case was the right to receive land for sidings. From its decision to the present time the case has been known and referred to as the Railroad Sidings

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Case. This was the point to which the attention and argument of defendant's counsel was mainly directed. In his brief submitting the case to the Court the attack on the entire land grant of defendant was not discussed. That was an afterthought. When, after submission, additional argument was called for, defendant's counsel saw that the State's case was confronted by the following dilemma: If the defendant was entitled under its charter and laws, prior to the Act of 1876, to receive land for the construction of its road to San Antonio, that settled the question, and it did not need the aid of the Act of 1876, which became inapplicable. But if it be true that, at the passage of the Act of 1876, defendant had no right to receive land under its charter or other laws, then there was no good reason why it was not a beneficiary under that act and entitled to land under its provisions. When called on for a supplemental argument, defendant's counsel saw that the Attorney-General, in endeavoring to escape the first horn of the dilemma, had impaled himself on the second. Hence, he contented himself with calling attention briefly to the Attorney-General's predicament. To impale him on either horn was sufficient to win the point concerned.

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Logic follows nature and does not try to impale with both horns at the same time.

The foregoing explains why the counsel for defendant did not argue or present the many grave and difficult questions which the Court should and would have discussed and decided if it had intended to definitely determine the rights of defendant to receive land under its charter and laws prior to the Act of 1876. It explains why the Court was able to say:

> "The Attorney-General contends, and "counsel for appellant seems to concede, "that the authority to issue the certificates, "if it existed at all, was conferred by the "Act of August 16, 1876."

It is true that twice in the course of its opinion the Court stated that defendant had not acquired any right by the construction of that particular piece of road prior to the Act of 1876. But a reading of the decision in the light of the foregoing explanation will show that such statements are based on the tacit concession made by defendant's counsel. An examination of the argument of defendant's counsel and of the opinion of the Court will demonstrate that not one of the questions presented by defendant's

contention in the case now at bar—that it had and has a right to receive land for the construction of its road from Columbus to Guadalupe Bridge under laws prior to 1876—was presented to or considered or passed upon by the Court in the case under discussion. For instance, the Court did not consider or pass upon the rights of defendant under Section 11 of its charter of 1870 ("the most favored railroad clause") in connection with Acts of the Legislature subsequent to the constitutional amendment of 1873, granting to various railroad companies a right to receive sixteen sections of land per mile of completed road. Nor was the Court called upon to determine the effect of the peculiar form of the Constitutional Amendment of 1873, which we contend removed the bar against legislative grants of land in aid of railroads as of the date of 1869, and was intended to give effect to intermediate legislation on the subject. Nor were any of the questions now presented to your Honors urged or decided. The Court simply took a short cut to a decision of the broad question before it—whether the defendant had a right to the land under any laws. In doing so it accepted the concession of defendant's counsel, and assumed that it was not

entitled to the land prior to 1876, and thus reached the conclusion that it was entitled to the land under the Act of 1876. It was proper to made the assumption without actually considering and deciding the points involved; for neither party would have been injured, and the result would have been the same, if the contrary of the assumption had been the truth.

It is claimed that this decision is a bar, or at least an estoppel, to the assertion by the defendant of a right to receive land for the construction of its road between Columbus and the Guadalupe Bridge.

If by bar is meant that the decision opposes the force of the thing adjudged to the rights set up by defendant in this suit, it is sufficient to answer that the identities necessary to constitute *res adjudicata* are lacking.

The parties are the same, but the thing demanded and the cause of action are clearly different. If it is meant merely that the former case opposes the authority of a decision of the Supreme Court of Texas against the rights now claimed by defendant, enough has been said to show that the decision is not authoritative on that point. Does that case speak with authority

upon the meaning and effect of the proviso in the constitutional amendment saving all legislative grants of land to railroads passed prior to its final adoption from being subject even to the limit of twenty sections to the mile, or upon defendant's contention that the amendment related back to the prohibition of 1869, removing the bar and giving effect to intermediate legislation? It does not speak at all upon the subject. And it is likewise silent upon the right of defendant under Section 11 of its charter to have the same rights to land as were conferred upon other railroads by the special legislation which followed the adoption of the constitutional amendment of 1873. These rights of defendant may or may not exist, but it certainly has a right to have them passed upon by the Court. They were not presented to the Court in the former case, and they were not then considered or decided.

The claim that the concession made by defendant's counsel in the Val Verde case is an estoppel against the assertion of a right, in respect to the portion of the road concerned in this suit, to receive land under legislation prior to 1876, is without merit. It is repugnant to the common ethics of logic and to fair reasoning to make use

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of a concession, tacit or express, made for the purposes of an argument elsewhere than in the argument with reference to which it was mad.e If defendant's counsel had dreamed that his tacit concession in that case would be used to defeat even the assertion or any rights of defendant in other litigation, he would have qualified and explained it, as has been done above. If, out of abundant caution, he had qualified his position by declaring that it was made simply for the purposes of that suit, because he could afford to yield the point without affecting the result, no question of estoppel would ever have arisen. Assuming, for the sake of the argument, that the defendant had valid rights to land under legislation prior to 1876, which would protect it against the demand made by the State in this suit, is it not preposterous to hold that, by the failure of counsel to qualify a position taken in argument in another case, his client has lost the right to recover 800,000 acres of land not concerned in the former case?

It is an essential element of an estoppel that the person pleading it should have been misled to his prejudice by the words or conduct of the party against whom it is pleaded. This essential

is wanting in the present case, for the State has been in no way prejudiced by the concession made in the Val Verde case. It has been intimated that defendant's change of position has in it an element of bad faith; that it won the Val Verde suit by admitting it had no right to land prior to the Act of 1876, and it now seeks to win this suit by withdrawing that admission. This charge is easily refuted. Suppose the tacit concession had not been made in the Val Verde case, what would have been the result? Defendant's counsel would have presented and urged the rights of defendant prior to 1876, which are now set up. The Court might have contented itself with stating the dilemma of the State, and saying that defendant was entitled to land either under legislation prior to 1876, or under the Act of 1876, and that it was unnecessary to decide which was the true source of its right, since under one or the other it was entitled to the lands in question, except so much as had been received for sidings. Or it might have settled the question then as to defeudant's rights. If it had decided in defendant's favor the questions now presented to the Court, the decree would have been the same as the one actually rendered. For

the failure to complete the road in the stated time did not of itself work such a forfeiture of its charter rights, including the right to land (Schulenberg vs. Harriman, 21 Wall., 44).

If it had decided against defendant's rights under prior legislation, it would have been exactly where the tacit concession placed it, and would have proceeded to render the same decree.

We submit, therefore, with confidence, there is nothing in this decision which can operate as an estoppel or bar to the assertion by appellant of its rights to land under legislation prior to 1876, and, moreover, that there is nothing authoritative in the decision as to the views of the Supreme Court of Texas upon the questions involved in the claims of appellant under such legislation.

If your Honors decide against appellant, on their merits, the rights it now sets up to the land in suit, based on its charter and the general laws prior to 1870 or 1876, it will have no cause to complain; but we respectfully submit that it would be a hardship, amounting almost to a denial of justice, to hold that appellant is estopped from urging those rights, and your Honors are precluded from examining into their merits, simply because, in a suit in which those rights

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were not essential and without prejudice to the case could be laid out of view (inasmuch as the portion of the road then in question was built subsequent to the Act of August, 1876), appellant's then counsel did not consider it worth while to insist upon them.

We ask that the decree of the State Court be set aside, and that the right of plaintiff in error to the lands in controversy be recognized and established.

Respectfully submitted,

JAS. A. BAKER,
R. S. LOVETT,
JOSEPH PAXTON BLAIR,
Of Counsel for Plaintiffs in Error.

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APPENDIX.

AN ACT to incorporate the Buffalo Bayou, Brazos and Colorado Railroad Company:

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That Sidney Sherman, Hugh McLeod, John G. Todd, John Angier, Jonathan F. Barrett, E. A. Allen, Wm. M. Rice, W. A. Van Alstyne, J. H. Stevens, B. A. Sheppard and W. H. Hutchins, and their associates and successors be, and they are hereby created and established a body corporate and politic, under the name of the Buffalo Bayou, Brazos & Colorado Railway Company, with capacity in said corporate name to make contracts; to have succession and a common seal; to make by-laws for the government and the regulation of its affairs; to sue and be sued; to plead and be impleaded; to grant and receive; and generally to do and perform all such acts and things as may be necessary or proper for, or incident to the fulfillment of its obligations, or to the maintenance of its rights under this act, and consistent with the constitution of this state.

SEC. 2. That the said company be, and is hereby invested with the right of locating, constructing, owning and maintaining a railway, commencing at any suitable point on Buffalo Bayou, between Lynchburg and Houston, in the county of Harris, and thence running by such course, and to such point at or near the Brazos River, between the towns of Richmond and Washington, inclusive, as said company shall deem most suitable, with the privilege of

making, owning and maintaining such branches of said railway as they may deem expedient.

SEC. 3. That the parties named in this act, or a majority of them, with such persons as they may associate with themselves for this purpose, are hereby appointed commissioners and invested with the rights of forming and organizing said company, and generally of exercising the powers of Directors until Directors are chosen, when the powers of the commissioners shall cease.

SEC. 4. That the capital stock of said company shall not exceed five hundred thousand dollars. The amount to be determined by the Commissioners or Directors, and by them divided into shares of such equal par value as they shall think fit, each share entitling the owner thereof to one vote, in person or by proxy, at all meetings of the company; and the shares shall be deemed personal estate, and shall be transferrable by any conveyance in writing, recorded either by the treasurer in books kept by him at his office for that purpose, or by an officer duly authorized by the Directors, in books kept by him at such other place as the said Directors may appoint: Such transfers are recorded in such other place being written (within ?) thirty days, communicated to the treasurer, and by him entered into his books.

SEC. 5. That the immediate government and direction of the affairs of the company shall be vested in a Board of not less than five directors. Said directors shall elect one of their own number to be President of the company. The first Board of Directors shall be chosen by said commissioners and such persons as they may associate with themselves for the purpose, and at such time and place as they shall appoint; and they shall hold their offices until others are duly elected in their places by the members of the company. No person shall be eligible to the office of director unless a subscriber or owner of at least five shares of the capital stock. The directors shall have power to fill any

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vacancy in their own Board, arising from non-election, death, resignation or other cause; to appoint a clerk, treasurer and such other officers and agents as they may consider necessary, and prescribe and require bonds for the faithful performance of their duties. They may, if the same is not fixed by the by-laws, determine the manner of calling and conducting all meetings, the number of members that shall constitute a quorum; and do or cause to be done all other lawful matters and things which they may deem necessary or proper in conducting the business of the company; they shall keep, or cause to be kept, accurate records of all meetings of the directors and company, and accurate books of accounts of the receipts and expenditures of the company. A majority of the Board of Directors shall have the power of a full board, and all conveyances and contracts in writing executed by the President and countersigned by the treasurer, or any other officer duly authorized by the directors, under the seal of the company, and in pursuance of a vote of the Directors, shall be valid and binding.

Sec. 6. That the shares in said capital stock may be disposed of by the directors in such manner and on such terms as they shall think best for the interest of the company; and any agreement in writing, whereby any person shall become a subscriber to the capital stock, may be enforced against him according to its terms. And if any subscriber shall fail to pay any amount due upon shares subscribed by him according to the terms of his subscription, the directors may sell at auction and transfer to the purchaser the shares of such delinquent, and if the proceeds of sale shall not be sufficient to pay the amount so due, with interest and charges, such delinquent shall be held liable to the company for the deficiency, and if the proceeds shall exceed the amount so due, with interest and charges, he shall be entitled to the surplus.

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SEC. 7. That it shall be lawful for the company to enter upon and purchase, or otherwise take and hold any land necessary for the purpose of locating, constructing and maintaining said railway, with all necessary depots and other buildings, and if they shall not be able to obtain such land by agreement with the owner thereof, they shall pay therefor such compensation as shall be determined in the manner provided in the following section. The land so taken for the road-bed shall not exceed fifty yards in width, and for depots and buildings only such further width as shall be necessary.

SEC. 8. That any person, when land has been taken as aforesaid, may apply to the District Court in the county in which such land is situated for the appointment of, and said court shall thereupon appoint three disinterested freeholders of the county, who shall appoint a time and place to hear the applicant and the company, to whom shall be given reasonable notice, by the court, of said time and place; and said freeholders shall, after being sworn, and after hearing the parties, determine the amount of compensation as aforesaid, and make return of their award to said court at its next term; and said award may be confirmed, or for any sufficient reason rejected by said court, in the same manner as awards of arbitrators under a rule of court; and if confirmed by the court, judgment shall issue thereon as in other cases. In determining the amount of compensation to be paid as aforesaid, said freeholders shall be governed by the actual value of the land at the time it was taken—taking into consideration the benefit or injury done to other neighboring land of the owner by the establishment of said railway. If in any case the amount found by the arbitrators shall not exceed the amount proved to have been offered by said company to the owner prior to his application to the court, the owner shall pay the costs of the proceedings, otherwise the company shall pay the same.

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SEC. 9. That it shall be the duty of said company, whenever any state or county road now established shall be crossed by said railway, to make and keep in repair good and sufficient cause-ways at such crossings, and in all cases where any person shall own land on both sides of the railway, and there shall be no other convenient access from one part to the other, such owner shall have the right of passage free of costs at all reasonable times across said railway.

SEC. 10. That the City of Houston is hereby authorized to construct, or cause to be constructed, a branch railway from said city to connect with the railway hereby established; that they shall have the same rights to enter upon and condemn lands as the company have, and generally to have the same rights to construct their branch as are granted by the charter to the railway company; and the Mayor and Aldermen of said city of Houston are hereby made a party to this charter. And when such brach railway shall be so constructed, the cars of such branch may be run over said main railway, or any part thereof; *provided*, the cars of such branch railway are run at such hours as not materially to interfere with the running of the cars of said main railway; *and provided further*, that the proprietors of said branch pay to the company owning said main railway such compensation for the use of said main railway as shall be reasonable, the amount of such compensation, unless agreed upon by the parties, to be determined by three disinterested men, one of whom shall be chosen by the President, or chief officer of each of said railway companies, and the other by those two; the decision of said three men to be final, and binding for the period of two years from the rendering the same; *and provided further*, that the proprietors of said branch railway shall not be at liberty to use upon said main railway, or any part thereof, their own engines or other motive powers, unless the company owning said main railway shall unreasonably refuse or

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neglect to draw the cars of said branch over said main railway with the engines or other motive power of said company.

SEC. 11. That as soon as the railway company hereby established shall commence running any portion of their road, they shall file in the State Department a full and accurate report of the cost and mode of construction of their road, and make such further reports of their doings and condition as the Legislature shall from time to time require.

SEC. 12. That if said company shall cross any navigable stream they shall do it so as not to interfere with its navigation.

SEC. 13. That said company may acquire by purchase or gift any real estate the directors shall think desirable in order to promote or hasten the construction of said railway. They may borrow money on their bonds or notes at such rates as shall be deemed expedient; *provided, however,* that nothing in this act shall be construed to confer banking privileges of any kind.

SEC. 14. That said commissioners shall have the right to demand and receive such rates and prices for the transportation of passengers and freight as they may think proper, not exceeding five cents per mile for passengers, and not exceeding the rate of fifty cents per hundred pounds for every hundred miles the same may be carried; *provided, however,* that the state shall have the right to regulate the price to be charged for carrying the mails.

SEC. 15. That if any person shall wilfully injure or obstruct said railway or its property, such person shall be punished by fine and imprisonment at the discretion of the court, and shall also be liable to action by said company for damages.

SEC. 16. That the sale of town lots in the town of Harrisburg hereafter made by said company, or their agent, shall not be considered binding upon the purchaser, unless said

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railroad shall be in complete and practicable operation for the distance of twenty miles within two years from the passage of this charter; the sale of the lots to be annulled by a reconveyance of the lots to the company.

SEC. 17. That if said railway is not commenced within one year from the passage of this act, and if at least twenty miles are not in running order within two years, then this charter shall be null and void.

Approved February 11th, 1850.

Note: The above act is published in the General Laws of the Third Legislature of Texas 1849–50 as Chapter CLVI, Pages 194–198.

AN ACT legalizing the Organization of the Buffalo Bayou, Brazos & Colorado Railroad Company:

WHEREAS, the commissioners of said company were under the necessity of using the power of attorney of two of the absent commissioners for the purpose of calling a meeting of the same; and

WHEREAS, there is a doubt as to the right of said commissioners to act by virtue of a power of attorney under the charter granted to said company, in calling said meeting; therefore,

SECTION 1. *Be it enacted by the Legislature of the State of Texas,* That the organization of the Buffalo Bayou, Brazos & Colorado Railroad Company, which took place in the City of Boston, in the State of Massachusetts, on the first day of June, 1850, be and is hereby declared legal, and shall have the same force and effect as if organized strictly in conformity with said charter.

SEC. 2. That this act take effect from and after its passage.

Approved September 4, 1850.

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Note: The above act is published as Chapter XV, pages 13–14 General and Special Laws of the Third Legislature of Texas.

"AN ACT to amend the 13th, 16th and 17th Sections of the 'Act to incorporate the Buffalo Bayou, Brazos and Colorado Railroad Company'.

SECTION I. *Be it enacted by the Legislature of the State of Texas*, That Sections 13th, 16th and 17th of the 'Act to incorporate the Buffalo Bayou, Brazos and Colorado Railroad Company, approved Feb. 11, 1850, be amended so as to read as follows:

SEC. 13th. That said Company may acquire by purchase or gift any real estate the Directors shall think desirable, in order to promote or hasten the construction of said Railroad. They may borrow money on their bonds or notes, at such rates as shall be deemed expedient, and *mortgage their property to secure the same; prouided*, however, that nothing in this Act shall be construed to confer banking privileges of any kind.

SEC. 17. That if said railroad is not commenced within one year from the passage of said Act of Incorporation, and if, at least, twenty miles are not in running order within *three years* then this charter shall be null and void." (Amended.)

SEC. 2. That said extension of time hereby intended to be granted to said company is granted upon the following conditions: That said company shall be required, at all reasonable times, and for a reasonable compensation, to draw over their road, the passengers, merchandise and cars of any other railroad corporations which have been, or may hereafter be, authorized by the legislature of the State to enter with their railroad and connect with the Railroad of

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said Company; And if the respective companies or corporations shall be unable to agree upon the compensation aforesaid to be paid, the President of each of said companies shall choose one man as a commissioner, and these two shall elect a third man as umpire, neither of whom shall be a stockholder or employee of either road, but entirely disinterested, and they shall fix the rates, which shall not be changed for one year from the time of their going into effect. Said commissioners shall also fix stated periods at which said cars are to be drawn as aforesaid, having reference to the convenience and interests of said corporations, and the public who will be accommodated thereby. And the State hereby reserves the power to make, from time to time, such reasonable regulations for the government of said company as may appear to be required for the public good, and as may be usual and customary in other States.

SEC. 3. That this Act take effect from and after its passage. Passed January 31st, 1852.

AN ACT to amend an Act to incorporate the Buffalo Bayou Brazos & Colorado Railway Company:

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That sections second, third and seventeenth of the "Act to incorporate the Buffalo Bayou, Brazos & Colorado Railway Company", approved February 11, 1850, be so amended as to read as follows:

SECTION 2. That said company be, and is hereby invested with the right of locating, constructing, owning and maintaining a railway, commencing at a suitable point on Buffalo Bayou in the county of Harris, and thence running by such course and to such point or points at or near the Brazos and Colorado rivers, or across the same as said company may deem advisable, with the privilege of making, owning and

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maintaining such branches to said road as they may deem expedient.

Sec. 3. The capital stock of said company shall consist of all its property, real and personal, franchises and rights to property; shall be divided into shares of one hundred dollars each, each share shall entitle the owner thereof to one vote in person or proxy, at all meetings of said company; said shares shall be deemed personal estate, and shall be transferable by any conveyance in writing, recorded either by the Treasurer in books kept by him at his office for that purpose, or by any other officer duly authorized by the directors, in books kept by him in such other place as the directors may appoint. Such transfers as are recorded at such other place, being within thirty days communicated to the Treasurer, and by him entered into his book.

Sec. 17. If at least twenty miles of said railway are not in running order by the 11th February, 1854, then said charter shall be null and void.

Sec. 2. That there shall be granted to said company eight sections of land, of six hundred and forty acres each, for every mile of railway actually completed and ready for use, and upon the application of the President of the company, or any duly authorized agent thereof, stating that any section of five miles or more of said railway has been completed and is ready for use, it shall be the duty of the Comptroller of Public Accounts to require the State Engineer or a commissioner to be appointed by the Governor, to examine said railway, and upon his certificate that said section of said railway has been completed in good and substantial manner, and is ready for use, the Comptroller shall give information of that fact to the Commissioner of the General Land Office, whose duty it shall be to issue to said company land certificates to the amount of eight sections of land, of six hundred and forty acres each, and shall be located upon any unappropriated domain of the State of Texas, within twelve

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months from the issuing thereof, which date shall appear upon the face of each certificate, and upon the return of the field-notes of any survey made by virtue of any certificate thus issued, it shall be the duty of the Commissioner of the General Land Office to issue patents to said company in their corporate name; one-fourth of which said lands thus patented shall be alienated by the company in six years, one-fourth in eight years, one-fourth in ten years, and the other fourth in twelve years, so that the whole of the lands thus granted shall pass from the hands of the company within twelve years from the date of the patents thus issued. Said company shall have the same right or power that any other company have, or may hereafter have, chartered by this state, to connect and contract with other railway companies, and in case of disagreement between said companies, the same shall be referred and settled as provided for in like cases, and be binding for one year.

SEC. 3. The sixteenth section of said act of incorporation is hereby repealed.

SEC. 4. That this act be in force and take effect from and after its passage.

Approved January 29, 1853.

Note: The above act is published as Chapter II, pages 3–5 of the Special Laws passed at the extra session of the Fourth Legislature of Texas.

AN ACT to encourage the construction of Railroads in Texas by donations of lands.

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That any railroad company chartered by the Legislature of this state, heretofore or hereafter, constructing within the limits of Texas a section of twenty-five miles

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or more of railroad, shall be entitled to receive from the state a grant of ~~sixteen~~ sections of land for every mile of road so constructed and put in running order.

SEC. 2. That any railroad company having actually put under contract as much as twenty-five miles of its road, or its entire road when the length may not exceed twenty-five miles, upon filing a certified copy of such contract with the Commissioner of the General Land Office, and depositing with the Treasurer of the state a bond with two or more good sureties, to be approved by him in favor of the Governor of the state, in the sum of ten thousand dollars, conditioned as hereinafter required, may file an application with any district surveyor of any land district in this state, a copy of which applicaton shall in all cases be forwarded to the Commissioner of the General Land Office by the district surveyor, to survey any quantity of the public domain lying and being in such district, and subject to location and entry, not to exceed eight hundred sections, and said application shall specifically describe the lands applied for and intended to be surveyed; and if said company shall produce and file with the district surveyor a certificate of the Commissioner of the General Land Office that a copy of its contract has been filed in said office for the construction of twenty-five miles or more of said road; and also a certificate from the Treasurer that a bond as required by this act has been deposited in his office, said application shall exempt the land so designated from any future location, entry or preemption privilege until otherwise directed as hereinafter provided; provided, that no application for a survey of lands under the provisions of this act shall be made for more than six months before the completion of such section; and if said section be not completed and notice thereof given as herein provided within six months from the time of the application, then such land applied for shall become

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subject to location and entry as if no such application had been made.

SEC. 3. That it shall be the duty of said company to cause to be surveyed the land so designated, into sections of six hundred and forty acres each, and in square blocks of not less than six miles, unless prevented by previous surveys or a navigable stream, which surveys shall be delineated upon a map or maps, the even and odd sections being differently colored and regularly numbured from one upwards to the full number contained in the block, and the field notes of said surveys and map or maps shall be by said company doposited with the Commissioner of the General Land Office.

SEC. 4. That the condition of the bond mentioned in the second section of this act shall be that said company will cause to be surveyed the land designated and applied for within the time limited for the construction of said section of twenty-five miles by the contract, and in the manner required by the third section of this act; and shall actually construct the said section of twenty-five miles of said road within the time mentioned in said contract, in default of which said land shall become forfeit to the use of the state, which forfeiture shall be declared by the District Court of Travis county at the first term thereafter without other formality than as hereinafter provided.

SEC. 5. That if at the time stipulated in said contract for the completion of said section of twenty-five miles, the field-notes and map or maps of the land applied for, be not deposited in the General Land Office as herein required, it shall be the duty of the Commissioner to forward immediately to the Treasurer of the state and the district surveyor of the land district where the land applied for is situate, a certificate of the fact, whereupon the land so applied for shall become subject to location and entry by any one as if no such application had been made; and it shall be the

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duty of the Treasurer ten days before the session of the district court of Travis county to cause notice of such forfeiture to be advertised in one of the newspapers published at Austin for two successive weeks; and at said session of the district court it shall be the duty of the Attorney General, or in case he be not present, of the District Attorney, to file a motion for the forfeiture of said bond, whereupon said court shall proceed without other citation or notice, to declare said bond absolutely forfeited and to render judgment against said company and surities for the amount of judgment against said company and sureties for the amount of said bond, upon which judgment execution shall issue as in ordinary cases; provided, that it shall be necessary for the Attorney General or District Attorney to file with said motion a certified copy of said bond under the hand and seal of the Treasurer, and also a copy of the contract deposited in the General Land Office, and a certificate of the commissioner that said surveys and map or maps of the lands applied for have not been returned.

Sec. 6. That any railroad company having completed and put in running order a section of twenty-five miles or more of its road, may give notice of the same to the Governor, whose duty it shall be to appoint some skilful engineer, if there be no state engineer, to examine said section of road, and if upon the report of said engineer, under oath, it shall appear that said road has been constructed in accordance with the provisions of its charter, and of the general laws of the state in force at the time regulating railroads, thereupon it shall be the duty of the Commissioner of the General Land Office to issue to said company patents for the odd sections surveyed in pursuance of the second and third sections of this act; but in case said lands, or any part thereof, shall not have been surveyed at the time said section is completed, then it shall be the duty of said commissioner to issue to said company certificates of 640 acres

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each, equal to sixteen sections per mile of road as completed, whereupon said company may apply to the district surveyor of any land district in this state to survey any quantity of vacant land subject to location and entry in such district, not to exceed twice the quantity of certificates so issued, which surveys shall be made, numbered and colored as directed in the third section of this act, and upon the return of the field-notes and map or maps of such surveys to the General Land Office, and the certificates so issued it shall be the duty of the commissioner to issue to said company patents for the odd sections of said surveys; provided, that in case the surveys are not applied for before the completion of any section of road, it shall not be necessary to deposit with the Treasurer a bond as required in the second section of this act.

Sec. 7. The fractional sections containing more than 320 acres shall be regarded as whole sections; and two fractional sections, each containing less than 320 acres, shall be taken as a whole section under the provisions of this act: and all the alternate or even sections shall be reserved to the use of the state until appropriated by law.

Sec. 8. That surveys under the provisions of this act may be made by persons employed by the company, and the field-notes may be deposited with the Commissioner of the General Land Office without being recorded in the office of the district surveyor; provided, that the state in no case shall be liable for surveying any part of said lands, nor shall any company pay for the fees of patenting the odd sections as herein provided.

Sec. 9. That any railroad company in this state acquiring lands or other real estate by virtue of the provisions of this act, or by virtue of the provisions of any other act or charter enacted by the Legislature of the State of Texas, by purchase, donation or otherwise, shall proceed to alienate the same except so far as may be necessary to the mainten-

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ance and running of said road, in six, eight, ten and twelve years ; that is, one-fourth shall be alienated in six years, one-fourth in eight years and one-fourth in twelve years from the time of acquiring such lands or real estate, in such manner that the whole of such lands or real estate shall pass out of the hands of such company within twelve years from the date of its acquisition ; provided, moreover, that said lands and real estate shall in no instance be alienated to any other corporation, except so far as may be necessary for the proper uses and the conduction of the business of such corporation.

SEC. 10. That if any company should neglect or fail to alienate its lands or real estate, as herein directed, evidences of which alienations said company shall cause to be filed with the Secretary of State, it shall be the duty of that officer to notify the Comptroller of Public Accounts and Commissioner of the General Land Office of such failure to alienate, whereupon the Commissioner shall furnish the Comptroller with a list of the lands acquired by said company under this or any other act of the Legislature of the state, and the dates at which such lands were acquired ; and the Secretary of State shall also furnish the Comptroller with a schedule of the lands owned and alienated by said company, as the same appears from the last annual return made to his office by said company, in pursuance of the general law of the state regulating railroad companies ; and it shall be the duty of the Comptroller of Public Accounts, immediately upon receiving said returns, to cause to be advertised in the newspapers in the city of Austin for sale, sixty days after such advertisement, the lands herein directed to be alienated, proceeding in the order in which said lands and real estate were granted or deeded to said company ; and after deducting all necessary expenses of the sale, the balance shall be deposited with the Treasurer to the credit of said company.

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SEC. 11. That all the alternate or even sections of land surveyed in pursuance of the provisions of this act, or of any other act of the Legislature of this State, donating lands to any railroad company, shall be reserved to the use of the state, and not liable to locations, entries or pre-emption privileges until otherwise provided by law.

SEC. 12. That the provisions of this act shall not extend to any company receiving from the state a grant of more than sixteen sections of land, nor to any company for more than a single track road, with the necessary turnouts; and any company now entitled by law to receive a grant of eight sections of land per mile for the construction of any railroad, accepting the provisions of this act, shall not be entitled to receive any grant of land for any branch road; provided, this act shall not be so construed as to give to any company now entitled by law to receive eight sections of land, more than eight additional sections; provided, that no person or company shall receive any donation or benefit under the provisions of this act, unless they shall construct and complete at least twenty-five miles of the road contemplated by their charter within two years after the passage of this act; and such donations shall be discontinued in every case where the company or companies shall not construct and complete at least twenty-five miles of the road contemplated by their charter, each year after the construction of said first-mentioned twenty-five miles of road; and further provided that the proviso herein contained shall not extend to any railroad, the terminus of which is not fixed on the Gulf coast, the Bays thereof, or on Buffalo Bayou, and that nothing in this section shall be so construed as to extend the duration of any existing charter; and further provided, that the certificates for land issued under the provisions of this act shall not be located upon any land surveyed or titled, previous to the passage of this act; and further provided,

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that this act shall continue in force for the term of ten years from the time it shall take effect and no longer.

SEC. 13. That no railroad hereafter to be built shall be entitled to receive the additional sections of land herein granted, unless the railings of such road shall weigh at least fifty-four pounds to the yard.

Approved January 30, 1854.

Note: The above act is published as Chapter XV, pages 11–15 General Laws passed by the Fifth Legislature of Texas.

AN ACT supplemental to "An Act to encourage the construction of Railroads in Texas, by donations of land."

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That no railroad company availing itself of the provisions of the act to which this is a supplement, shall receive more than sixteen sections of land to the mile by virtue of said act, or any *proviso* therein contained. And no road benefited by said act shall receive any donation of land under its charter, or under the act to which this is a supplement, for any work not done within ten years after the passage of this act; and this act shall be in force at the same time that the act to which this is a supplement shall take effect.

Approved January 30, 1854.

Note: The above act is published as Chapter XVI, page 16 General Laws passed by the Fifth Legislature of the of the State of Texas.

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AN ACT to amend An Act Incorporating the Buffalo Bayou, Brazos and Colorado Railroad Company, approved February the eleventh, eighteen hundred and fifty.

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That the "Buffalo Bayou, Brazos and Colorado Railroad Company" shall be entitled to all the rights, privileges and benefits accruing from any general law or laws that have or may hereafter be passed by this state to encourage the constructing of railroads, in the same manner and to the same extent as if the gauge of said road was the same now fixed or which may be hereafter fixed upon by this state.

Approved February 4, 1854.

Note: The above act is not published as Chapter XLV, page 69 of the Special Laws passed by the Fifth Legislature of Texas.

AN ACT supplemental to "An Act to amend an Act to incorporate the Buffalo Bayou, Brazos and Colorado Railroad Company," passed at the present session of the Legislature.

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That if the Buffalo Bayou, Brazos & Colorado Railroad Company shall avail themselves of the act to which this is a supplement, or accept any donation of land from the state, they shall not be entitled to receive any such donation from the state under the provisions of this law, or any law that has heretofore been passed for their benefit, for any portion of their road which shall not be completed and ready for use within ten years from and after the passage of this act; Provided, that said company shall restrict them-

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selves to the following route, viz: to an extension of their existing road to Austin, in the county of Travis, crossing the Brazos river at any point between the town of Richmond in Fort Bend county, and Hidalgo Falls, in Washington county, and with the right of extending their road from Austin to connect with any road running north of Austin towards the Pacific Ocean. Provided, such connections be made between the ninety-sixth and ninety-eighth parallels of longitude; and provided, further, that said company shall have no right to build branches from their main road.

Sec. 2. This act shall take effect from and after its passage.

Approved February 4, 1854.

Note: The above act is published as Chapter XLVI, page 70 of the Special Laws passed by the Fifth Legislature of Texas.

AN ACT for the relief of companies incorporated for purposes of Internal Improvement, by allowing them further time for the performance on account of the pending War.

Section 1. *Be it enacted by the Legislature of the State of Texas*, That the time of the continuance of the present war between the Confederate States and the United States of America, shall not be computed against Internal Improvement Company in reckoning the period allowed them in their charters, by any law, general or special, for the completion of any work contracted by them to do; *provided*, That this act shall not be so construed as to revive any charter of a Railroad Company which has been forfeited prior to the 21st day of May, 1861.

Sec. 2. The President and directors of the Houston and

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Texas Central Railroad Company shall, before the provisions of this act shall extend to the benefits of said company, pass a resolution restoring the original *bona fide* stockholders of said company—those who have paid for their stock—to all the rights, privileges and immunities to which they were entitled previous to, and of which they were divested by the sale of the said road to W. J. Hutchins and others, and shall forward to the Governor of the state a copy of said resolution, signed by the President and countersigned by the Secretary or Treasurer, under the seal of said company, and said company shall not have the power to repeal said resolution so as to defeat the object of this act; *provided*, that if the original *bona fide* stockholders should fail to pay into the treasury of said company ten per cent. upon their said stock, on or before the expiration of the extension of time provided in this act for the fulfillment of the charter obligations of said company to the state, then and in that case said stockholders shall forfeit all their rights, privileges and property interests as stockholders in said road.

Sec. 3. The President and directors of any railroad company in this state shall not have the power to sell out stockholders in said company by virtue of any law now in force, until the expiration of the time of extension provided in this act for the fulfillment of its charter obligations to the state.

Sec. 4. The provisions of any law, contrary to those of this act, shall have no force or effect so far as they may conflict with the provisions of this act, and this act shall take effect and be in force from and after its passage.

Approved January 11th, 1862.

Note: The above act is published as Chapter LXII, pages 43–44, General Laws passed by regular session Ninth Legislature of Texas.

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AN ACT for the relief of Railroad Companies:

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That the failure of any chartered railroad company in this state to complete any section or fraction of section of its road, as required by the existing laws, shall not operate as a forfeiture of its charter or of the lands to which said company would be entitled under the provisions of an act, entitled "An Act to encourage the construction of railroads in Texas, by donations of land," approved January 30th, 1854, and the several acts supplementary thereto, provided said company shall complete such section or fraction of section as would entitle it to donations of land under existing laws within two years after the close of the present war between the Confederate States and the United States of America.

SEC. 2. That during the time named in the first section of this act, any such company having completed and in running order, twenty-five miles of its road, shall be entitled to receive from the state a grant of sixteen sections of land for every mile of road constructed, or which may hereafter be constructed and put in running order, beyond the said section of twenty-five miles; *provided*, that no company shall receive from the state more than sixteen sections of land per mile for any portion of its road now or hereafter constructed, unless otherwise provided by its charter, or special provision of some law.

SEC. 3. That upon the application of any company which may have completed any portion of its road beyond the said section of twenty-five miles, the Commissioner of the General Land Office shall issue to said company certificates for the lands to which it may be entitled under the provisions of this act, and which may have been designated, and caused to be surveyed by said company in accordance with existing laws; *provided*, that this act shall not be so construed as to

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conflict with, or in any manner alter or change the provisions of an act entitled "An Act for the relief of the Memphis and El Paso Railroad Company, and all other railroad companies," passed March 20th, 1861.

SEC. 4. That the lands to which any such company may now be entitled in pursuance of this act may be designated, surveyed and patented at any time within two years after the passage of this act; and the President and Directors of the Houston and Texas Central Railroad Company shall, before the provisions of this act shall extend to the benefit of said company, pass a resolution restoring the original *bona fide* stockholders of said company—those who have paid for stock—to all the rights, privileges and immunities to which they were entitled previous to and of which they were divested by the sale of said road to W. J. Hutchins and others, and shall forward to the Governor of the state a copy of said resolution, signed by the President, and countersigned by the Secretary or Treasurer, under the seal of said company; and said company shall not have the power to repeal said resolution so as to defeat the object of this act; provided, that if the said original *bona fide* stockholders should fail to pay into the Treasury of said company ten per cent. upon their said stock on or before the expiration of the extension of time provided in this act for railroad companies, to fulfill their charter obligations to the state, then, and in that case, said stockholders shall forfeit all their rights, privileges and property interests as stockholders in said road.

SEC. 5. That this act take effect and be in force from and after its passage.

Approved January 11th, 1862.

Note: The above act is published as Chapter LXIX, pages 46–47 General Laws passed at regular session Ninth Legislature of Texas.

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AN ACT for the benefit of Railroad Companies.

SECTION 1. *Be it enacted by the Legislature of the State of Texas,* That the grant of sixteen sections of land to the miles to railroad companies, heretofore or hereafter constructing railroads in Texas, shall be extended, under the same restrictions and limitations heretofore provided by law, for ten years after the passage of this Act.

SEC. 2. That the time for the alienation of the lands acquired by railroad companies, heretofore, shall be extended to fourteen for the alienation of one-half of such lands, and to twenty-one years for the alienation of the other half; and, in the event such alienation does not take place, the said lands shall be forfeited to the state; and companies hereafter acquiring lands shall alienate the same in fourteen and twenty-one years from the date of acquisition, under a like penalty of forfeiture.

SEC. 3. That the benefits of this Act shall not apply to any company hereafter that avails itself of the provisions of the 2d, 3d, 4th and 5th sections of an Act entitled "An Act to encourage the construction of railroads in Texas," approved January 30, 1854, or of the act supplementary thereto, approved February 16th, 1858.

SEC. 4. That it is not intended by the preceding section to interfere with or impair the rights which have been heretofore acquired by companies under laws heretofore in force but to preclude companies from hereafter taking advantage of the provisions of sections 2, 3, 4, and 5 of the Act of January 30th, 1854, and the supplementary act thereto of 16th February, 1858; *provided,* that all tap roads over twenty-five miles long shall be entitled to the benefits of this act.

SEC. 5. That this act be in force from its passage.

Approved November 13, 1866.

Note: The above act is published as Chapter CLXXIV, page 212, General Laws Eleventh Legislature of Texas.

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AN ACT Supplementary to the Act to incorporate the Buffalo Bayou, Brazos and Colorado Railway Company, and to the other Special Acts relating to said company.

WHEREAS, on the seventh July, 1868, "the road-bed, track, franchise, and chartered rights and privileges" of the Buffalo Bayou Brazos & Colorado Railway Company were sold on executions issued on judgments against said company; and on the twenty-fourth January, 1870, the railroad of said company from Harrisburg to Alleyton, and its franchise, rights and other property appertaining thereto, were sold under the provisions of a mortgage or deed of trust made by said company on the first November, 1860, all of which appears of record: and,

WHEREAS, The act of December 19, 1857, "supplementary to and amendatory of an act to regulate railroad companies" provides that the purchasers at such sales, and their associates "shall be entitled to have and exercise all the powers, privileges and franchises granted to" the company sold out "by its charter, or by virtue of the general laws of this state," and "shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges and benefits thereof;" and,

WHEREAS, the purchasers at said sales, and their associates, have formed a new company under said old name, and have expended large sums of money in the reconstruction of said railroad, in the purchase and completion of the Columbus Tap Railroad, and the bridge of the Brazos Iron Bridge Company over the Brazos river at Richmond; and,

WHEREAS, said new company desires to be distinguished by name from said "sold out" company, to consolidate its property, and to extend said line of railroad; therefore,

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That the new company heretofore known as the

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Buffalo Bayou, Brazos & Colorado Railway Company, referred to in the preamble of this act, shall be hereafter known by the corporate name of "The Galveston, Harrisburg & San Antonio Railway Company," and may alter its seal to conform to its name; provided, that said new company shall be liable to the State of Texas for the debt of said "sold out" company, for loans made to the latter company from the special school fund, in the same manner and to the same extent as said "sold out" company was liable; and that said change of name shall in no respect impair or affect said liability, or the existing lien or mortgage of the state upon the railroad of said company as security for said loans. Also, provided, that said change of name shall in no respect impair or affect any of the obligations of said new company to other parties, or the obligations of other parties to said new company; all of which may be enforced by or against said new company under said new name.

SEC. 2. That said railroad company may avoid the sale of its railroad for its indebtedness to the state for loans from the special school fund, and for the non-payment of principal and interest, by the payment into the Treasury of the state, on the first day of November, A. D. 1870, of six months' interest on the aggregate amount due on account of said loans, principal and interest, as said aggregate amount stood on the first day of May, A. D. 1870, and by the payment in addition, on said first day of November, of one per cent. upon said aggregate amount, to be applied towards the sinking fund provided for by existing laws in respect to said loans, and by continuing to pay into the Treasury of the state six months' interest and one per cent. on account of said sinking fund semi-annually thereafter, to-wit, on the first day of May and November, in each year; provided that in case of failure to comply with any payment required under this section, the Governor shall sell the said road under the regulations provided in the law of August 13, 1856.

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SEC. 3. The said new company is hereby authorized to extend the existing line of railroad owned and operated by said company from Columbus, in Colorado county, to San Antonio, in the county of Bexar, within four years from the passage of this act, and thence to a terminus on the Rio Grande, by such route as the directors shall deem most feasible, with a branch from the most suitable point to New Branufels, in Comal county, within four years from the passage of this act; or said new company may connect with any line of railroad that may be constructed or under construction to San Antonio or the Rio Grande, south of the latitude of the City of Austin and the Colorado river, instead of building its own line beyond the point of such connection; and may build to and connect with any line of railroad that may be constructed, or under construction, and designed to form part of any railroad line to the Pacific, south of the thirty-fifth parallel of latitude; nothing herein being so construed as to exclude said new company from the right to construct also any part of the line up the Colorado valley formerly designated by said "sold out" company as its route under the provisions of the eleventh section of the act of December 19, 1857; provided, that if the said road shall not be completed within the time specified in this section, then this charter shall be forfeited.

SEC. 4. That said new company may consolidate with its existing railroad the bridge built by the Brazos Iron Bridge Company over the Brazos River at Richmond, and the five miles of railroad, more or less, including side-tracks, from the town of Alleyton to the town of Columbus, built under the charter granted in the year 1860 to the Columbus Tap Railroad Company, including the bridge over the Colorado river at Columbus, together with all the franchises, rights, fixtures and appurtenances of, or upon any of the same, and may construct and maintain telegraphs along its lines.

SEC. 5. That said new company may issue its bonds,

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under seal or otherwise, and secure the same by a mortgage or mortgages upon its said consolidated line of railroad, or any part of the same and any such mortgage may be so expressed as to include and cover, as said company shall construct the same, the lines of railroad it may construct in extension of its existing line, together with all the franchises and rights, bridges, depots, fixtures, equipments machinery, and the appurtenances and property of said railroad and of said company, of every kind, or any part thereof, whether constructed or acquired before or after the execution of said mortgage, and with provision for a sinking fnnd sufficient for the extinguishment at their maturity of the principal of the bonds secured thereby. That the amount of bonds that may at any time be outstanding under any such mortgage shall not exceed twenty thousand dollars for each mile of single main track, with the necessary turnouts included in such mortgage, and completed and in running order. That all the bonds secured by any such mortgage shall be on an equality in respect to the benefits of the same, shall be of the same form and tenor, except that they may be of different dates, and for different amounts, and shall mature at the same time, in not more than fifty years from the date of those of said bonds which shall be first issued. That said bonds shall bear interest at such rates, not exceeding eight per cent. per annum, payable semi-annually; both principal and interest shall be payable in gold, or other lawful currency of the United States, at the places named in the bonds and coupons, and, with said mortgage or mortgages, may be otherwise in such form and contain such stipulations not inconsistent with the provisions of this act as the directors shall think proper to embody therein.

SEC. 6. That said new company may issue such other bonds, and sscure them by other mortgage or mortgages on its railroad, franchises and property, or any part of the

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same, subsequent and subject to the mortgages hereinbefore provided for, as the interests of said company may require. Any bonds lawfully issued by said new company may be disposed of by the directors on such terms as they think proper.

SEC. 7. That the issue of any of the bonds, and the execution of any mortgage provided for in the two preceding sections shall not impair, or in any way affect, the lien or mortgage held by the state upon the railroad, franchises, rights or property of said new company as security for loans made to said "sold out" company as aforesaid, or any of the rights of the state in respect to the same. And if any such mortgage is made whilst said lien or mortgage of the state exists, it shall be made expressly subject thereto.

SEC. 8. That in case it shall be made to appear to the Government that there has not been issued upon said railroad the full quantity of sixteen sections of land scrip for every mile of the same that was constructed and put in running order prior to the war of the late rebellion, in accordance with the provisions of the charter and of the general laws of the state in force at the time regulating railroads, there shall be issued to said new company said scrip to the amount of any such deficiency, notwithstanding said railroad may not have been constructed and completed at the rate of twenty-five miles each year after the construction of the first twenty-five miles, as provided in the act of January 30, 1854.

SEC. 9. That meetings of said new company and of the directors may, when desirable, be held at an office of said company in Boston Massachusetts, as well as at the "principal office" of the company in Texas; provided, that the votes passed at meetings in Boston shall be, within thirty days therefrom, spread upon the records, which shall be kept at the "principal office" in Texas. That a majority of the directors and the President and Treasurer shall not be

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required to reside in this state so long as the Vice-President and assistant treasurer reside therein; and directors may vote by proxy under such regulations as the by-laws shall prescribe.

Sec. 10. That said new company may make a terminus of said railroad at the city of Houston, or change the present terminus from Harrisburg to Houston, and for that purpose may acquire, by agreement with the owners, any part of the Houston Tap and Brazoria Railroad; and said company may make a terminus at the city of Galveston, arranging with any railroad running to Galveston for a third rail thereon, or other connection therewith, or extend its own line thereto, if preferable.

Sec. 11. That said new company shall be entitled to the same or similar rights and relief, except state aid in bonds, granted to or provided for any other railroad company by the Legislature, and upon the same or similar terms and conditions, so far as such rights or relief are, in their charter, applicable to said company or its lines, or lines of railroad.

Sec. 12. That nothing in this act shall be so construed as to deprive any party interested of the right to disprove any assumed fact stated in the preamble; provided, that nothing in this act contained shall be construed as reviving or renewing any land grant to said company for road hereafter to be completed, which it does not possess by existing law.

Sec. 13. That this act shall take effect from and after its passage.

Passed July 27, 1870.

Note: The above act is published as Chapter XXVIII, Special Laws Called Session of Twelfth Legislature of Texas.

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JOINT RESOLUTION proposing an amendment to Section 6 of Article ten of the Constitution of the State of Texas.

Be it resolved by the Legislature of the State of Texas, That Section six of Article ten of the Constitution of the State of Texas be so amended as hereafter to read and be as follows :

" SECTION 6. The Legislature shall not hereafter grant lands, except for purposes of internal improvement, to any person or persons, nor shall any certificate for land be sold at the Land Office except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres; *provided*, that the Legislature shall not grant out of the public domain more than twenty sections of land for each mile of completed work in aid of the construction of which land may be granted; *and provided further*, that nothing in the foregoing proviso shall affect any rights granted or secured by laws passed prior to the final adoption of this amendment."

Passed May 17, 1871.

Note: The above resolution is published as Chapter XXVI, page 160 of the Joint Resolution passed at the first session of the Twelfth Legislature of Texas.

JOINT RESOLUTION ratifying an amendment to Section Six of Article Ten of the Constitution of the State of Texas, proposed by Joint Resolution of the Legislature of the State of Texas, passed May 17th, 1871.

WHEREAS, The Legislature of the State of Texas, on the 17th day of May, 1871, passed by a two-third vote, a

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joint resolution proposing an amendment to Section six of Article ten of the Constitution of the State of Texas; and,

WHEREAS, Said proposed amendment was submitted to the consideration and vote of the people at the last general election held in this state on the 5th, 6th, 7th and 8th days of November, A. D. 1872; and,

WHEREAS, It appears that a majority of those voting upon said proposed amendment voted in favor of said amendment; therefore,

Be it resolved by the Legislature of the State of Texas, That the said amendment to Section six of Article ten of the Constitution of the State of Texas, which is as follows: "Sec. 6. The Legislature of the State of Texas shall not hereafter grant lands except for purposes of internal improvement, to any person or persons, nor shall any certificate for land be sold at the Land Office except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres; *provided*, that the Legislature shall not grant, out of the public domain, more than twenty sections of land for each mile of completed work, in aid of the construction of which land may be granted; *and provided further*, that nothing in the foregoing proviso shall affect any rights granted or secured by laws passed prior to the final adoption of this amendment;" be and the same is hereby ratified as an amendment to the Constitution of the State of Texas.

SEC. 2. That this resolution take effect and be in force from and after its passage.

Passed March 19th, 1873.

Note: The above is published as Joint Resolution No. 7, pages 224–225 General Laws passed by the Thirteenth Legislature of Texas.

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Section 6, Article X of the Constitution adopted in 1869–70 reads as follows:

"SECTION 6. The Legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the Land Office except to actual settlers upon the same in lots not exceeding one hundred and sixty acres."

AN ACT to encourage the construction of railroads in Texas by donations of land.

SECTION 1. *Be it enacted by the Legislature of the State of Texas*, That any railroad company heretofore chartered, or which may be hereafter organized under the general laws of this state, shall, upon the completion of a section of ten miles or more of its road, be entitled to receive, and there is hereby granted to every such railroad, from the state, sixteen sections of land for every mile of its road so completed and put in good running order; *provided*, that no company whose road is of less than three feet gauge shall be entitled to receive any grant of lands under this section; *provided, however*, that companies constructing railroads on the prismoidal plan shall be entitled to eight sections of land to the mile on the same terms as other roads; *provided, further*, that this act shall not be construed to renew or continue any right to companies who have failed or may fail to comply with the terms of their charters, with reference to the completion of portions of their roads in stated times; *provided further*, that the provisions of this act shall not be so construed as to grant the aid herein provided for to any railroad that has already received or is otherwise entitled to receive aid from the state to the amount of sixteen sections of land to the mile.

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SEC. 2. Any railroad company having completed and put in good running order a section of ten miles or more of its road, may give notice of the same to the Governor, whose duty it shall be to appoint some skillful engineer, if there be no State Engineer, to examine said section of road, and if, upon the report of said engineer under oath, it shall appear that said road is substantially built, and fully equipped for the transportation of both passengers and freight, and that the same is operated by steam, and is constructed of iron rails of not less than thirty pounds to the lineal yard; *provided*, that rails for prismoidal roads shall not weigh less than twenty-two pounds to the lineal yard, and has been constructed in accordance with the provisions of its charter, or of the general laws under which it may be constructed, and of the general laws in force regulating railroads; thereupon it shall be the duty of the Commissioner of the General Land Office to issue to said company certificates of six hundred and forty acres of land each, equal to sixteen sections to the mile of road so completed; whereupon said company may apply to the district surveyor of any land district in this state to survey such lands out of any of the unappropriated public land in his district: said surveys shall be made in alternate sections, or half sections, as nearly square as practicable, one section for the company, and one for the state, for the benefit of the public school fund, a map of all such surveys shall be returned with the field notes to the General Land Office, when the Commissioner of the General Land Office shall number contiguous surveys with even and odd numbers, and shall issue to the company patents for the odd sections of said surveys.

SEC. 3. All lands acquired by railroad companies under this act shall be alienated by said companies, one-half in six years and one-half in twelve years from the issuance of patents to the same, and all lands so acquired by railroad companies, and not alienated as herein required, shall be for-

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feited to the state and become a part of the public domain, liable to location and survey as other unappropriated lands; *provided further*, that the state shall retain the right to regulate the rates of freight and passengers' fare by general law on all roads accepting the grant of land under this act.

SEC. 4. That there being no law authorizing state aid in construction of railroads now in force, an imperative public necessity and an emergency exist for the immediate passage of this act, and it is hereby declared that this act take effect and be in force from and after its passage.

Approved August 16, 1876.

Takes effect ninety days after adjournment.

Note: The above act is published as Chapter CI, pages 153–154 General Laws passed by the Fifteenth Legislature of Texas.

AN ACT to repeal all laws granting lands or land certificates to any person, firm, corporation or company for the construction of railroads, canals and ditches.

SECTION 1. *Be it enacted by the Legislature of the State of Texas,* That all laws or parts of laws now in force granting lands or land certificates to any person, firm, corporation or company for the construction of railroads, canals and ditches, be and the same are hereby repealed.

SEC. 2. The fact that the public domain subject to location by the owners of these certificates has been exhausted creates an imperative public necesssity and an emergency requiring the constitutional rule that bills be read on three several days in each house be suspended, and the same is therefore suspended; and that this act take effect and be in force from and after its passage, and it is so enacted.

Approved April 22, A. D. 1882.

Takes effect from passage.

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